Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

CELPAGE, INC., *et al.*;
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The historic concept of "Universal Service" was derived from the Communications Act of 1934's mandate to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Prior to the adoption of the Telecommunications Act of 1996 ("Telecom Act"), "Universal Service" meant the availability of basic exchange telephone service to all parts of the nation at affordable, relatively comparable rates.

The Telecom Act revised the Universal Service regime in several important respects. In the final days preceding enactment of the Telecom Act, a few Senators sponsored an amendment to that bill to create a new federal program whose purpose was to make discounted telecommunications, and any other "special services" the FCC might designate, available to "elementary schools, secondary schools and libraries for educational purposes..." That amendment also required telecommunications carriers, in response to any "bona fide request" for services specified by the FCC, to provide those services to schools and libraries at discounted rates. This amendment was approved by the Senate, and became part of the Telecom Act. Congress did not authorize or appropriate any funds for this program; rather, it was to be funded by what the statute termed "contributions" from "all providers of telecommunications services." The Universal Service provisions of the Telecom Act thus present these important questions, all of which qualify for a grant of certiorari under Rule 10(c) of this Court's Rules:

1. Whether the Fifth Circuit erred in upholding certain Universal Service statutory provisions in that the U.S. Congress has improperly delegated, in violation of the Taxing

Clause and the Origination Clause, its revenue and legislative authority to a regulatory agency, the FCC, allowing the FCC to adopt and impose Universal Service tax payment obligations on telecommunications carriers and non-carriers for an unlimited range of federal programs?

2. Whether the Fifth Circuit erred in upholding the Universal Service statute in that it is so vague as to give the FCC virtual *carte blanche* as to how to define the supported services, how to pay for them, and how to punish parties who refuse to "contribute" a percentage of their annual revenues to these programs?

3. Whether the Fifth Circuit erred in upholding the FCC's interpretation of Section 332 of the Act, thereby improperly allowing the states to impose Universal Service tax payment obligations on Commercial Mobile Radio Service ("CMRS") carriers?

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Fifth Circuit are listed in the caption of the decision below, see Appendix at Appendix 1.

Pursuant to Supreme Court Rule 29.6, petitioner Celpage states that is has no parent company. Pam Am Wireless, Inc. is a wholly-owned subsidiary of Celpage.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. ii

LIST OF PARTIES AND AFFILIATES. iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW. 1

JURISDICTION. 1

STATUTORY PROVISIONS INVOLVED. 1

STATEMENT OF THE CASE. 1

1. Universal Service Regulatory History 1

2. The U.S. Senate's Creation of New "Universal Service" Programs. 3

3. The FCC's Universal Service Rulemaking Proceedings. 5

4. The Fifth Circuit Decision. 10

5. Petitioner's Interest in These Proceedings. 11

REASONS FOR ISSUING THE WRIT. 12

I. THE FCC'S NEW UNIVERSAL SERVICE REGIME IS AN UNCONSTITUTIONAL TAX. . 12

II. THE STATUTORY PROGRAM IS VOID FOR VAGUENESS. 21

III. THE FCC'S DETERMINATION THAT STATES MAY IMPOSE UNIVERSAL SERVICE OBLIGATIONS ON CMRS PROVIDERS WAS CLEARLY ERRONEOUS. 26

CONCLUSION. 30

Page

APPENDIX

Opinion of the Court of Appeals for the Fifth Circuit ..... Appendix 1

Fifth Circuit Denial of Rehearing ... Appendix 111

47 U.S.C. § 254 ..... Appendix 113

47 U.S.C. § 332 ..... Appendix 123

Congressional Budget Office
Cost Estimate (July 19, 1995) ..... Appendix 134

U.S. General Accounting Office,
Letter to Senator Ted Stevens,
February 10, 1998 (B-278820) ..... Appendix 148

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS *Page*

U.S. Const. art. I, §§ 7, 8. . . . . 14, 19, 21

CASES

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935). 14

A.B. Small Co. v. American Sugar Ref. Co.,
267 U.S. 233 (1925). 22

American Trucking Ass'ns, et al. v.
U.S. Environmental Protection Agency,
175 F.3d 1027 (D.C. Cir. 1999). 9, 15

Cellular Telecommunications Indus. Ass'n v. FCC,
168 F.3d 1332 (D.C. Cir. 1999). 26

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). 10, 27

Connally v. General Constr. Co.,
269 U.S. 385 (1925). 22

Coates v. Cincinnati, 402 U.S. 611 (1971). 23

Dane v. Jackson, 256 U.S. 589 (1921). 21

Department of Revenue v. ACF Indust.,
510 U.S. 332 (1994). 29

Page

Kolender v. Lawson, 461 U.S. 352 (1983). 25

Loving v. United States, 517 U.S. 748 (1996) 13, 14

Marshall Field & Co. v. Clark, 143 U.S. 649 (1892). 15

Morton Salt Co. v. City of South Hutchinson,
159 F.2d 897 (10th Cir. 1947). 21

Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,
472 U.S. 237 (1985). 28

National Cable TV Ass'n v. United States,
415 U.S. 336 (1974). 18, 19, 21

Pace v. Burgess, 92 U.S. 372 (1876). 16

Plaut v. Spendthrift Farm, 514 U.S. 211 (1995). 14

Reid v. Rolling Fork Pub. Util. Dist.,
979 F.2d 1084 (5th Cir. 1992). 11

Rural Tel. Coalition. v. FCC,
838 F.2d 1307 (D.C. Cir. 1988). 20

Smith v. Illinois Bell, 282 U.S. 133 (1930). 2

Smith v. Goguen, 415 U.S. 566 (1974). 24,25

Texas Office of Pub. Util. Counsel v. FCC,
183 F.3d 393 (5th Cir. 1999). ..... *passim*

Twin City Bank v. Nebeker, 167 U.S. 196 (1897). 16

Page

United States v. City of Huntington, WV,
999 F.2d 71 (4th Cir. 1993). 21

United States v. Munoz-Flores,
495 U.S. 385 (1990). 18, 19

United States v. United States Shoe Corp.,
523 U.S. 360 (1998). 18, 19

United States v. Maryland,
471 F.Supp. 1030 (D.Md. 1979). 20

William Thomas v. Network Solutions, et al.,
176 F.3d 500 (D.C. Cir. 1999). 18, 19

Whisenhunt v. Spradlin, 464 U.S. 965 (1983). 22

STATUTES AND LEGISLATIVE HISTORY

Telecommunications Act of 1996,
Pub. L. No. 104-104, 110 Stat. 56 (1996). 4

47 U.S.C. § 151. 4

47 U.S.C. § 254(a). 4

47 U.S.C. § 254(b). 29

47 U.S.C. § 254(b)(3)(G). 4

47 U.S.C. § 4, 25

47 U.S.C. § 254(c)(1). 13, 23

47 U.S.C. § 254(d). 5, 25

Page

47 U.S.C. § 254(e) 5

47 U.S.C. § 254(h)(1)(A). 5

47 U.S.C. § 254(h)(1)(B). 4, 5

47 U.S.C. § 254(j). 4

47 U.S.C. §332(c)(1). 11

47 U.S.C. §332(c)(3). ..... *passim*

H.R. Rep. No. 103-711 (1993). 28

Joint Explanatory Statement of the Comm. of Conference, H.R. Rep. No. 104-458 (1996). 4, 28

S. Rep. No. 104-23 (1995). 28

FEDERAL AGENCY DECISIONS

Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Bd., Report and Order, 2 FCC Rcd. 2639, ¶ 17 (1987), recon. granted in part, 3 FCC Rcd. 5518 (1988) 2

Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, Inc.; Federal-State Joint Bd. on Universal Service, 12 FCC Rcd. 18, 400 (1997). 7

Page

Federal-State Joint Bd. on Universal Service, Report and Order,
11 FCC Rcd. 7920 (1996). 1

Federal-State Joint Bd. on Universal Service, Recommended Decision,
12 FCC Rcd. 87 (1996). 5

Federal-State Joint Bd. on Universal Service, Report and Order,
12 FCC Rcd. 8776 (1997). . . . . *passim*

Federal-State Joint Bd. on Universal Service, Third Order on Reconsideration,
12 FCC Rcd. 22801 (1997). 8, 24

Federal-State Joint Bd. on Universal Service, Fourth Order on Reconsideration,
13 FCC Rcd. 5318 (1997). . . . . *passim*

Federal-State Joint Bd. on Universal Service, Twelfth Order on Reconsideration,
64 FR 30440 (May 28, 1999). 8, 9, 17, 24

MTS & WATS Market Structure, Third Report and Order,
93 FCC 2d 241 (1983). 2, 23

MTS & WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Bd., Decision and Order,
51 Fed. Reg. 1371 (Jan. 13, 1986). 3

Page

MTS & WATS Market Structure and Amendment of Part 67 of the Commission's Rules, Report and Order, 2 FCC Rcd. 2953 (1987), recon. 3 FCC Rcd. 4543 (1988) 3

National Exch. Carrier Ass'n, Inc., 5 FCC Rcd. 173, (Com. Car. Bur. 1989). 3

Order In the Matter of Request for Review of the Decision of the Universal Service Administrator by Wathena Unified Sch. Dist., Wathena, Kansas, DA 99-2493 (Released November 9, 1999) 9

Order In the Matter of Request for Review of the Decision of the Universal Service Administrator by Greenfield Sch. Dist., Greenfield, Wisconsin, DA 99-2614 (Released November 22, 1999). 9

Proposed First Quarter Universal Service Contribution Factors, Public Notice, DA 97-2392 (released Nov. 13, 1997). 7

FEDERAL REGULATIONS

47 C.F.R § 54.101 12

47 C.F.R § 54.201 12

47 C.F.R. § 54.101(a), (b). 23

47 C.F.R. § 54.503 23

47 C.F.R. § 54.517(b). 23

Page

47 C.F.R. § 54.601(c). 23

47 C.F.R. § 54.711(a). 22

OTHER AUTHORITIES

Congressional Budget Office Cost Estimate (July 19, 1995) 16

Federal-State Joint Bd. on Universal Service, Report to Congress in Response to Senate Bill 1768 and Conference Report on H.R. 3579, FCC 98-85 (rel. May 8, 1998). 14

U.S. General Accounting Office, Letter to Senator Ted Stevens, February 10, 1998 (B-278820) 17

OPINIONS BELOW

The opinion of the Fifth Circuit reviewing the FCC's *Universal Service Order* is reported at 183 F.3d 393. It is reproduced in the Appendix beginning at Appendix 1.

JURISDICTION

The judgment of the Fifth Circuit was entered on July 30, 1999. A timely petition for rehearing *en banc* was denied on September 28, 1999. See Appendix 111. This Court has jurisdiction over these consolidated cases pursuant to 28 U.S.C. § 1254 (1). See also S. Ct. R. 12.4.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are Sections 254 and 332 of the Communications Act, 47 U.S.C. §§ 254, 332. These provisions are reprinted in the Appendix at Appendix 113 through Appendix 133.

STATEMENT OF THE CASE

1. Universal Service Regulatory History. The historic concept of "Universal Service" was derived from the Act's mandate to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Until adoption of the Telecom Act, "universal service" meant the availability of basic exchange telephone service to all parts of the nation at affordable, relatively comparable rates. See, e.g., Federal-State Joint Bd. on Universal Service, 11 FCC Rcd. 7920 (1996). It is more costly to serve some areas than others; consequently, keeping rates "affordable" for consumers in high cost areas has meant averaging those costs with the costs of serving consumers in the lower cost areas, or shifting them to interexchange customers. In the days of the Bell System

monopoly, this assignment of exchange plant costs to the interstate jurisdiction was accomplished through a division of revenues process. See *MTS & WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, ¶ 11 (1983) ("Access Charge Order").

In 1983, the FCC instituted a program of "access charges" which, as the name implied, imposed flat rate charges for access to the public switched telephone network ("PSTN"). End users were thereafter required to pay a "subscriber line charge" to the particular local exchange carrier ("LEC") from which they received local telephone service, and interexchange carriers ("IXC") were required to pay "carrier common line" ("CCL") charges and usage-based charges to the LECs. See Access Charge Order at ¶¶ 138-150.

Because much of the same LEC plant is used for both intrastate and interstate traffic, the costs of that plant must be allocated to either the state jurisdiction (recovered in the rates for local exchange service), or the interstate jurisdiction (recovered through the SLC and the charges to long distance carriers). See, e.g., Access Charge Order at ¶ 59 quoting Smith v. Illinois Bell, 282 U.S. 133 (1930). To accomplish this task, the FCC, on the recommendations from State-Federal Joint Boards, adopted a revised Jurisdictional Separations Manual to determine the allocation of costs between the state and interstate jurisdictions. See *Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board*, Report and Order, 2 FCC Rcd. 2639, ¶ 17 (1987), recon. granted in part, 3 FCC Rcd. 5518 (1988).

Post-divestiture Universal Service "high cost assistance" relied upon the access charge and jurisdictional separations processes to lower basic telephone rates in high-

cost areas by allowing LECs with high local "loop"[1] costs to allocate more of those costs to the interstate jurisdiction. See, e.g., National Exchange Carrier Ass'n, Inc., 5 FCC Rcd. 173, ¶ 2 (Com. Car. Bur. 1989). The "Lifeline" program and the subsequently-adopted "Link-Up America" program, aimed at assisting low income consumers, also relied upon this complex regime of cost-shifting. "Lifeline" involved a waiver of the federal subscriber line charge for qualifying consumers in participating states. See *MTS & WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 51 Fed. Reg. 1371 (Jan. 13, 1986). "Link Up" allowed LECs that waived service initiation fees for such consumers to assign the amount of those fees to the interstate jurisdiction. See *MTS & WATS Market Structure and Amendment of Part 67 of the Commission's Rules*, Report and Order, 2 FCC Rcd. 2953 (1987), recon. 3 FCC Rcd. 4543 (1988).

In short, the Universal Service program, then and now, shifts the costs of local exchange service from some consumers to others. Until the enactment of the Telecom Act, this shifting of costs occurred only among providers of what consumers think of as "telephone service," that is, local and long distance telecommunications carriers.

2. The U.S. Senate's Creation of New "Universal Service" Programs. On February 8, 1996, the

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[1] A "loop" is a "pair of wires, or its equivalent, between a customer's station and the central office from which the station is served." See 47 C.F.R. Part 36, Appendix-Glossary. The "central office" is a "switching unit . . . having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only." Id.

Telecom Act[2] was signed into law. The Telecom Act added a new Section 254 to the Communications Act of 1934[3] ("the Act"), which required that a Federal State Joint-Board recommend, and the Commission adopt, rules to revise the then-extant system of Universal Service subsidies, including defining the services to be supported by the new system and adopting explicit support mechanisms. See 47 U.S.C. § 254(a), (b).

Section 254 created a new federal program to make discounted telecommunications, and any other "special services" the FCC might designate, available to "elementary schools, secondary schools and libraries for educational purposes ...." 47 U.S.C. § 254(h)(1)(B); see Con. Rep. 104-458, 104th Cong., 1st Sess. (1996), at CR19-20. That law also required telecommunications carriers, in response to any "bona fide request" for services specified by the FCC, to provide those services to schools and libraries at discounted rates. See id. This statutory amendment was approved by the Senate, and became part of the Telecom Act. Congress did not authorize or appropriate any funds for this program; rather, it was to be funded by "contributions" from "all providers of telecommunications services." 47 U.S.C. §254(b)(4).

The "universal service" provisions of the Telecom Act thus established a program for subsidization of supported telecommunications services provided by eligible carriers in high-cost areas, 47 U.S.C. § 254(b)(3)(G), left in place the "Lifeline" and "Link-Up" programs for low income consumers, 47 U.S.C. § 254(j), and created the new, discounted telecommunications and information services program for

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[2] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) (codified in scattered sections of 47 U.S.C.).

[3] 47 U.S.C. §§ 151-714 (k)(3).

qualified schools and libraries, and discounted telecommunications services for rural health care providers. 47 U.S.C. § 254(h)(1)(A), (B).

To pay for all these programs, the new statute redefined and greatly expanded the range of parties required to support Universal Service. Whereas the basic telephone services previously covered under "universal service" were supported only by LECs and IXCs, the new statute imposed Universal Service payment obligations upon: "[e]very telecommunications carrier that provides interstate telecommunications services ... [and,] [a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." 47 U.S.C. § 254(d).

The statute further states that "only an eligible telecommunications carrier designated under Section 214(e) . . . shall be eligible to receive specific Federal universal service support . . . ." 47 U.S.C. § 254(e). A carrier receiving "such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." Id.

3. The FCC's Universal Service Rulemaking Proceedings. On November 8, 1996, the Federal-State Joint Board (the "Joint Board") in CC Docket No. 96-45 released its recommendations to implement the provisions of new Section 254. *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd. 87 (1996). The FCC generally adopted the Joint Board's recommendations, including those recommendations as to the services to be supported as part of "Universal Service"; the eligibility of carriers to receive support from the Universal Service Fund

("USF"),[4] including the funds for schools and libraries and rural health care providers; the carriers required to contribute to the USF; and the basis for assessing carriers' contributions. See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776 at ¶¶ 56-107, 127-325, 424-749 (May 8, 1997) (the "R&O").

The FCC determined that only carriers providing specified services would be eligible for Universal Service support: single party service,[5] voice-grade access to the public switched network, Dual Tone Multifrequency signaling or its functional equivalent,[6] access to emergency service, access to operator services, access to interexchange service, access to directory assistance, and toll limitation services for qualifying low-income customers. See id. at ¶ 56. To be eligible for USF support from the high-cost area and low-income consumer funds, a carrier was required to provide *all* of the services covered by the definition of Universal Service. See id. at ¶¶ 56, 89, 90. The FCC also held that non-telecommunications service providers were eligible for USF payments from the schools and libraries fund, although for now they have no USF payment obligations. See id. at ¶ 32.

The Commission's rules for support of schools and libraries thus require telecommunications companies, including paging companies such as Celpage, to subsidize non-

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[4] The USF is actually four funds: the high-cost fund; the low-income fund; the schools and libraries fund; and the rural health care fund. See R&O at ¶ 18.

[5] "Single party service" means "only one customer will be served by each subscriber loop or access line" (for example, not party-line service). See R&O at ¶ 62.

[6] DTMF facilitates the transportation of signaling through the network, shortening call set-up time. See R&O n. 68.

telecommunications carriers. See R&O, ¶¶ 425, -428. Moreover, unlike all other affected parties, paging carriers may not recoup their contributions to the USF in the form of support payments. The FCC has defined "Universal Service" to include *only* services which paging carriers *cannot* provide over their allocated narrowband 25 kHz channels.

Despite these facts, which Celpage formally raised in the FCC's rulemaking proceeding, the FCC declined to exempt any class of carriers from USF contribution requirements, and decided that all carriers should contribute to the USF at the same rate, whether or not they would be eligible for USF subsidies. See id. at ¶¶ 39, 777. The FCC further determined that "contributions" would be based upon a carrier's gross end-user revenues (interstate revenues only for the high-cost area and low-income consumer funds; both interstate and intrastate revenues for the schools and libraries and rural health care funds) without any deductions, even for uncollectibles. See id. at ¶¶ 40, 772. Additionally, the FCC agreed with the Joint Board that Section 332(c)(3)(A) of the Act did not prevent the states from requiring CMRS carriers to contribute to intrastate Universal Service programs. See id. at ¶¶ 397, 791.

On July 18, 1997, the FCC ordered the National Exchange Carrier Association, Inc. ("NECA") to establish an independent, not-for-profit subsidiary, namely the Universal Service Administrative Company ("USAC"), to administer certain aspects of the USF. *Changes to the Board of Directors of the National Exchange Carrier Ass'n, Inc.; Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 18, 400 (released July 18, 1997) ("NECA Order").

NECA estimated that the amount required to fund and administer the USF would be $968.3 million for the first quarter of 1998 alone. See *Proposed First Quarter Universal Service Contribution Factors*, Public Notice, DA 97-2392

(released Nov. 13, 1997) (the "First Quarter Contribution Notice").[7] Based upon NECA's estimated costs for the high-cost program ($432.3 million) and low-income program ($136 million) in the First Quarter Contribution Notice, the new maximum total cost of the USF for the first three months of 1998 was $905.8 million.

That figure was predicted to grow in subsequent quarters.[8] And grow it did. By 1999, the FCC had doubled the size of the schools and libraries fund to the $2.25 billion cap.[9] See Twelfth Order on Reconsideration, 64 FR 30440 ¶ 1 ("Twelfth Recon. Order").

In its Fourth Recon. Order, the FCC largely denied the petitions for reconsideration of the R&O. The FCC specifically rejected arguments of paging carriers that application of the full USF burden to them was inequitable and contrary to the express language of Section 254. Fourth Recon. Order at ¶¶ 256-266. The FCC also upheld its ruling that the states may impose intrastate Universal Service requirements on CMRS providers. Id. ¶¶ 262-266. The FCC also rejected several petitioners' contentions that the Universal Service program was

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[7] The FCC subsequently directed USAC to collect no more than $25 million per quarter for the first and second quarters of 1998 to support the rural health care program, and no more than $625 million for the first half of 1998 to support the schools and libraries program. See *Federal-State Joint Board on Universal Service*, Third Order on Reconsideration, FCC 97-411, 12 FCC Rcd. 22801 (released Dec. 16, 1997) (the "Third Recon. Order").

[8] See Report to Congress on Universal Service, Separate Statement of Chairman William E. Kennard, Report No. CC 98-9, FCC 98-67 (April 10, 1998) (<http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.html>).

[9] In addition to the remaining requirements of the Schools and Libraries rural health care funds, proceedings are ongoing to adopt cost proxies for the requirements of the high-cost fund for rural LECs.

an unconstitutional tax. Id. ¶ 262.

To say that the FCC's universal service program has generated controversy would be an enormous understatement. As the cost and size of the program has grown exponentially in its brief tenure, so, too, has dissension among the FCC Commissioners, state public utility commissions, and on Capitol Hill with regard to the scope and legality of this enormous regulatory program.[10]

Even the recipients of these funds have joined the fray. On a daily basis, the FCC's Common Carrier Bureau adjudicates complaints from schools and libraries who have been denied their requests for universal service funding.[11] Nevertheless, the FCC's current Chairman evidently favors this program; indeed, he has repeatedly expressed a desire to expand its scope beyond its already vast borders.[12]

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[10] See Twelfth Recon. Order, Dissenting Statement of Commissioner Furchtgott-Roth (May 27, 1999) (http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr923.html); See also Twelfth Recon. Order, Statement of Commissioner Michael K. Powell Concurring in Part and Dissenting in Part (May 27, 1999) (http://www.fcc.gov/Speeches/Powell/Statements/stmkp915.html); see also Memorandum to Honorable George W. Gekas, Chairman, Subcommittee on Commercial and Administrative Law, House Judiciary Committee, re: Impact of American Trucking Ass'n v. EPA on FCC Rulemaking Under Section 254 of the Telecommunications Act of 1996 (September 16, 1999) (http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr946.html).

[11] See, e.g., Order In the Matter of Request for Review of the Decision of the Universal Service Administrator by Wathena Unified School District, Wathena, Kansas, DA 99-2493 (Released Nov. 9, 1999); Order In the Matter of Request for Review of the Decision of the Universal Service Administrator by Greenfield School District, Greenfield, Wisconsin, DA 99-2614 (Released Nov. 22, 1999).

[12] See Twelfth Recon. Order, Statement of Chairman Kennard (May 27, 1999) (http://www.fcc.gov/Speeches/Kennard/Statements/stwek936.html).

4. The Fifth Circuit Decision. Several incumbent LECs, satellite service providers, state utility commissions, and petitioner Celpage filed petitions for review of the FCC's R&O, which were consolidated in the Fifth Circuit. Following briefing and argument, the Fifth Circuit concluded for the most part that the R&O does not violate statutory requirements or the Constitution.[13]

In addressing Celpage's arguments, the Fifth Circuit rejected Celpage's contention that the universal service program is an unconstitutional tax under the Taxing Clause and the Origination Clause. Id. at 426-28. While the Fifth Circuit noted that it was a "close question" as to whether the FCC's interpretation of the statute raises "serious constitutional doubts," it nonetheless deferred under the Chevron standard of review, and found that the FCC had jurisdiction to fund non-telecommunications and Internet services through the universal service program. Id. at nn.93, 95.[14]

The Fifth Circuit also denied Celpage's equal protection

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[13] Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) ("Texas OPUC"). While upholding most of the FCC's R&O, the Fifth Circuit did reverse and remand portions of the R&O that do not directly bear on Celpage's arguments, including: the FCC's decision to assess contributions based on international and interstate revenues; the requirement that ILECs recover their contributions from access charges; the blanket prohibition on additional state eligibility requirements for carriers receiving high-cost support; and the rule prohibiting local telephone service providers from disconnecting low-income subscribers. The Fifth Circuit concluded that the FCC exceeded its jurisdictional authority when it assessed contributions for the schools and libraries and high-cost support programs based on the combined intrastate and interstate revenues of interstate telecommunications providers.

[14] Furthermore, it inexplicably acknowledged that the FCC could order funds to be used to pay for the janitorial services in the school's computer rooms. Id. at n.93.

and unlawful taking challenges. Id. at 428-29. In response to Celpage's equal protection argument, the Fifth Circuit concluded that the FCC's explanation that paging carriers benefit from a larger and more universal public network system satisfied the "debatably rational" test articulated by the Fifth Circuit in Reid v. Rolling Fork Public Utilities District, 979 F.2d 1084, 1087 (5th Cir. 1992). Id. at 428.

Celpage's unlawful takings claim was dispensed of as not being ripe for review, because, the Fifth Circuit concluded, "a takings claims is not ripe until a claimant has unsuccessfully sought compensation from the state." Id. at 428-29.

Similarly, and despite acknowledging fairly obvious loopholes or vagaries in the statute and in the FCC's interpretation thereof, the Fifth Circuit did not address Celpage's vagueness argument, finding that the vagueness challenge was not ripe for review because the FCC had made a "tentative decision" regarding the calculations to be made to assess wireless carriers' revenues. Id. at 430.

Finally, while acknowledging that Celpage raised a "convincing challenge" to the FCC's determination that Section 332 was not a bar to state-imposed universal service payments by CMRS carriers, the Fifth Circuit nevertheless upheld the FCC's decision, finding that "the FCC's reading reflects Congress's unambiguous intent as expressed in the plain language of the statute and takes into account Congress's instruction that § 254 be constructed in ways that do not conflict with other federal laws." Id. at 433.

5. Petitioner's Interest in These Proceedings.

Petitioner Celpage is a CMRS telecommunications carrier. See 47 U.S.C. §332(c)(1). Celpage provides one-way paging services throughout Puerto Rico and the U.S. Virgin Islands. Telecommunications carriers such as Celpage, which provide only one-way messaging services, are required to

"contribute" a percentage of their revenues each year to these new universal service funds, to pay for a variety of computer and other non-telecommunications programs in schools and libraries, and to subsidize telephone services that are provided by monopoly LECs and oligopoly IXCs. Yet, Celpage is ineligible to receive universal service subsidies because it is not technically capable of providing the services the FCC deemed necessary to become an "eligible telecommunications carrier." See 47 C.F.R §§ 54.101, 54.201.

REASONS FOR ISSUING THE WRIT

This Petition presents the Court with profound, fundamental questions concerning separations of power. This Petition raises the important question of whether Congress, under the guise of adopting a vast, enormously expensive, and completely unfunded Federal program, may shirk its appropriation and taxation duties under the Constitution.

Also, the FCC's interpretation of Section 332, allowing for state imposition of Universal Service obligations on CMRS carriers, simply cannot be reconciled with the plain language of the Act or long-standing principles of statutory construction. That interpretation, which the Fifth Circuit affirmed, should be reversed.

I. THE FCC'S NEW UNIVERSAL SERVICE REGIME IS AN UNCONSTITUTIONAL TAX.

The U.S. Congress has improperly delegated its revenue and legislative authority to a regulatory agency, the FCC, in violation of the Taxing Clause.[15] The U.S. Supreme Court

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[15] Although the 5th Circuit suggested that Celpage did not raise a "Taxing Clause" objection to the FCC's program until its Reply Brief, Texas OPUC, 183 F.3d at 427 and n.52., it then proceeded to address that argument; hence, this issue is properly raised in this Petition.

recently restated the fundamental maxim that "[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny." Loving v. United States, 517 U.S. 748 (1996) (citing Motesquieu, The Spirit of the Laws, 151-52; 1 W. Blackstone, Commentaries 146-47, 269-70). The FCC's universal service program is a form of regulatory tyranny.

Under this newly expanded program, the FCC may adopt any universal service tax rate it chooses, and impose this tax upon anyone, be they a telecommunications carrier or not. See R&O at ¶¶ 425, 428.

Under similar circumstances, this Court has stated that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935) (citations omitted). The universal service program is similarly flawed. Congress has delegated unlimited authority to an executive agency to raise revenues and pass whatever regulations that agency deems necessary to promote a federal welfare program under the rubric of "universal service."

Although the FCC presumably believes it is acting in the public's best interests in implementing this enormously expensive and complicated program, the statute provides the agency virtually "no standards, aside from the statement of the general aims" of the universal service program. A.L.A. Schechter Poultry Corp., 295 U.S. at 541-42.

Even the "general aims" of Section 254 are opaque. Congress has defined "universal service" only as "an evolving level of telecommunications services . . . ." 47 U.S.C. § 254(c)(1). The enormous revenue and legislative power that Congress has delegated to the FCC "is not canalized within banks that keep it from overflowing. It is unconfined and

vagrant." A.L.A. Schechter Poultry Corp., 295 U.S. at 551 (Cardozo, J., concurring).

However well-intentioned this program may be, it bluntly violates the core Constitutional requirement that only elected Members of Congress have authority to levy and collect taxes, and promulgate general welfare programs. See U.S. Const. art. I, §§ 7, 8.[16] "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a national government that is both *effective and accountable*." Loving, 517 U.S. at 757 (emphasis added); see also Plaut v. Spendthrift Farm, 514 U.S. 211 (1995). The FCC is not a "branch fitted to the task" of defining and funding a multi-billion dollar general welfare program.

Section 254 breaches the walls between the branches of government, creating an enormous revenue and general welfare program, under the FCC's exclusive aegis, that is neither effective nor accountable to Congress. To date, this program has siphoned hundreds of millions of dollars from telecommunications companies, while leaving the nation no closer toward achieving "Universal Service,"[17] as the term has

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[16] See also Millard, Nicole L., Universal Service, Section 254 of the Telecommunications Act of 1996: A Hidden Tax?, 50 Federal Communications Law Journal 255 (1997).

[17] Annual percentages of households with telephone service "available" have changed little since the passage of the Telecom Act. In 1994, the percentage was 95.4; in 1995, it was 95.2; in 1996, it was 95.0; in 1997, it was 95.0; in 1998, it was 95.2; and through March of 1999, it was 94.9. Federal-State Joint Board, Monitoring Report, CC Docket No. 98-202, Report No. CC 99-27 (Released July 12, 1999) ("1999 Monitoring Report") (<http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/monitor.html>).

historically been understood.[18]

The statute's broad delegation to the FCC of revenue and legislative powers is fundamentally unconstitutional. Congress is not accountable for the billions of dollars flowing into this universal service program. Indeed, many Members of Congress have blamed the FCC for excesses in this revenue program.[19]

The statute does not merely ask the FCC to "execute" Congress's intentions, it unconstitutionally confers upon this small agency the "power to make the law" and "discretion as to what it shall be . . . ." Marshall Field & Co. v. Clark, 143 U.S. 649, 693 (1892) (citations omitted). That delegation of Congressional legislative power is unconstitutional.

The constitutional infirmities of the FCC's expanded universal service program are comparable to those found by the D.C. Circuit in American Trucking Associations, et al. v. U.S. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999). There, the D.C. Circuit ruled that the EPA had construed certain provisions of the Clean Air Act "so loosely as to render them unconstitutional delegations of legislative power." Id. at 1034.

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[18] See, e.g., *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 ("First Report to Congress"), Dissenting Statement of Commissioner Harold Furchtgott-Roth (rel. Apr. 10, 1998); *Federal-State Joint Board on Universal Service*, Report to Congress in Response to Senate Bill 1768 and Conference Report on H.R. 3579, FCC 98-85 ("Second Report to Congress"), Dissenting Statement of Commissioner Harold Furchtgott-Roth (rel. May 8, 1998).

[19] See, e.g., Sen. Conrad Burns, GAO Says FCC Overstepped Bounds, Press Release, <http://www.senate.gov/~burns/p980212d.htm> (rel. Feb. 12, 1998). McCain Speech to U.S. Telephone Association, Press Release, (rel. Mar. 5, 1998) <http://www.senate.gov/~mccain/telespch.htm>.

The FCC spent all of one paragraph in its appellate brief addressing Celpage's claim that the Universal Service program is an unconstitutional tax. See FCC Br. at 141. The FCC argued that the program is not a tax because "universal service contributions are not commingled with government revenues raised through taxes . . . ." Id.. As a matter of fact, the FCC is mistaken.

The fact is that Universal Service "contributions" have been designated by Congress as general revenues. Indeed, Senators who sponsored the universal service amendments to the Telecom Act admit that universal service revenues will "appear on [the federal budget] as governmental receipts and direct spending . . . ." Senate *amici* Br. at 13. Likewise, the Congressional Budget Office projects that the universal service program will add between $4.3 *billion* to $7.3 *billion* per year to the federal budget between 1996 and the year 2000. See Congressional Budget Office "Cost Estimate" at 4 (July 19, 1995) at Appendix 134. And, the Office of Management and Budget has determined that USF contributions should be treated as federal revenues. See U.S. General Accounting Office, Letter to Senator Ted Stevens, February 10, 1998 (B-278820) at n.16, at Appendix 148.

In determining whether the universal service program is a tax, as opposed to something else (the FCC never explained what these USF "contributions" are, if they are not taxes), this Court must "regard things rather than names." Pace v. Burgess, 92 U.S. 372, 376 (1876). Under Constitutional standards, this program must be deemed a tax. "[R]evenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897) (citations omitted).

In the case of the universal service program, the main

task that the FCC has accomplished to date is to raise money, and lots of it. Cf. Second Report to Congress, supra n.14, Attachment B (indicating that for the Schools and Libraries Fund alone, collections for the first quarter of 1998 exceeded $298 million; collections for the first half of 1998 were expected to reach approximately $619 million). The programs that the FCC has funded to date are largely not telecommunications services; and, most of them were previously funded by state and local governments, or through other federal programs.[20]

The FCC has not even attempted to argue that there is *any* correlation between the USF fees paid by telecommunications carriers, and the "value" of this program to

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[20] See, e.g., USAC, Federal Universal Service Programs: Fund Size Projections and Contribution Base for the First Quarter 2000 (filed November 2, 1999) ("USAC 1Q2000 Report"), available at <http://www.fcc.gov/ccb/universal_service/quarter.html> at 21-22 (USAC has committed $1,714,700,000 in Schools and Libraries Fund support for "Year 1," (January 1, 1998 through June 30, 1999) and as of October 29, 1999 has paid more than $1.1 billion; demand for "Year 2" (July 1, 1999 through June 30, 2000) is estimated at $2.35 billion, of which more than $1.46 billion is for internal connections); Appendix 11B (as of October 20, 1999, USAC has disbursed $13,026,686.48 for Year 2 requests). See also, Twelfth Recon. Order, Dissenting Statement of Commissioner Harold Furchtgott-Roth, supra note 10 (noting large percentage of requested funds for internal connections and availability of $10 billion for infrastructure from 40 other federal programs); Federal State Board on Universal Service, Fifth Order on Reconsideration and Fourth Report and Order, 13 F.C.C.R. 14915, Dissenting Statement of Commissioner Furchtgott-Roth at 5 (1998) (noting DOE report that 80% of schools and libraries were connected to the Internet prior to the USF). The commitments for the Schools and Libraries Fund exceed those for either of the "core" universal service programs: the Low Income and High Cost Funds, the latter of which is operating largely under the pre-Telecom Act system until January 1, 2000. See, e.g., 1999 Monitoring Report, supra n. 12, at 2-4; Table 2.2 ($463,935,302 paid for Lifeline and Link-Up support in 1998); Table 3.5 (projected high cost 1998 fund size, less administrative expenses, is $1,696,400,000).

them. Rather, this program "provides revenue for the government, for use on projects that do not directly benefit the payee ...", consequently, this is an unlawful tax program. See National Cable TV Ass'n v. U.S., 415 U.S. 336, 341-43 (1974) (FCC's 1.5% "regulatory fee" on cable TV operators reversed since it would require cable operators to pay "not only for benefits they received but for the protective services rendered the public by the Commission."). See also William Thomas v. Network Solutions, *et al.*, 176 F.3d 500 (D.C. Cir. 1999) (an Internet domain name registration fee which covered more than the registration costs, but was used in part to pay for Internet infrastructure, was an unconstitutional and unauthorized tax). Surely, if it is unconstitutional to charge Internet users $30.00 to help pay for "Internet infrastructure," then a federal program that assesses a flat assessment on telecommunications carrier revenues to help pay for computer systems in schools and libraries is most certainly an unconstitutional tax.

These new USF funds are not incidental to some existing regulatory program. Even the Fifth Circuit acknowledged that these funds will be used to pay for non-telecommunications services, and services that are not subject to FCC jurisdiction. Texas OPUC, 183 F.3d at nn. 93, 95. Consequently, the new universal service program cannot be found constitutional on the grounds that the revenues to be raised are merely incidental to some specific government program. Cf. United States v. Munoz-Flores, 495 U.S. 385 (1990).

The unconstitutional aspects of the new universal service program are no different in kind than those of the Harbor Maintenance Tax ("HMT") program, which this Court recently struck down. See United States v. United States Shoe Corp., 118 S. Ct. 1290 (1998). Although that tax was found unconstitutional under the Export Clause, the analogies to the universal service program are compelling.

In U.S. Shoe, as in this case, the federal government claimed that the tax in question was a "use fee" assessed on commercial users of the Nation's ports. Id. at 1291. This Court disagreed, finding that the export fees bore "the indicia of a tax." Id. This Court found that for the HMT to be a "usage fee," there must be a clearer "connection between a service the Government renders and the compensation it receives for that service . . . ." Id. at 1292. It found no such connection since the tax was imposed on the value of the cargo, rather tnan in proportion to usage of federal harbor services. Id.

Similarly, with the universal service program there is no correlation between the tax imposed (a flat, combined rate of almost 5% assessed against all telecommunications revenues), and a carrier's use of the PSTN (which is not, in any event, a "government-supplied service, facility or benefit" that might warrant a usage fee). For paging carriers such as Celpage, for instance, the universal service tax is based on revenues earned from their own proprietary radio networks, not the PSTN. The PSTN is not owned, maintained, or even financially supported in whole or part by the federal government; there simply is no "connection between a service the Government renders" and the universal service fees paid. Id. at 9. Moreover, if mere use of the telephone network was sufficient to support this as a regulatory fee, then every business in the U.S. that uses a telephone could be subject to this FCC "fee."

Since this universal service program is not a valid "use fee" program, but is in reality a general revenue program, the Constitution requires that the program originate in the U.S. House of Representatives and be approved by Congress. See Const. art I, §§ 7, 8. Cf. National Cable TV Ass'n v. U.S., 415 U.S. 336; William Thomas v. Network Solutions,176 F.3d 500. The consequences for a violation of the Origination Clause cannot be disputed: the courts must strike down any law that violates the Constitution. United States v. Munoz-Flores, 495

U.S. 385, 396-97; Marbury v. Madison, 1 Cranch 137, 176-80 (1803).

Despite the FCC's protestations to the contrary, see R&O, ¶¶ 39, 268-269, 787; it is clear that the Universal Service regime adopted by the FCC has at its core the purpose of raising revenue for matters that are in the general "public good." In contrast, the prior interstate access charge regime was upheld against a tax challenge, because those rules merely provided an apportionment of costs between interstate and intrastate telephone services, to equalize costs to consumers of using the largely inseparable telephone network among those who comprise that network. See Rural Tel. Coalition. v. FCC, 838 F.2d 1307, 1314 (D.C. Cir. 1988).

In contrast to the old regime, the new FCC scheme creates a broad and comprehensive federal aid program for rural areas, the poor, educational institutions, and certain health care services, substantially different in scope and nature from the regulatory regime it purportedly supplants. As worthy as those goals may be, such a broad relief mission renders the Universal Service scheme indistinguishable from any other tax used to subsidize programs for support of the common good. A tax is "taking money from the taxpayer for public purposes." United States v. Maryland, 471 F.Supp. 1030, 1036 (D.Md. 1979). Tellingly, the CBO and the OMB have determined that USF contributions should be treated as federal revenues, and USF payments as federal outlays; indeed, portions of the USF have been included in the federal budget. See Congressional Budget Office "Cost Estimate" at Appendix 134; see also U.S. General Accounting Office, Letter to Senator Ted Stevens, February 10, 1998 (B-278820) at n.16, at Appendix 148.

The fact that this tax is limited to supporting only certain activities (albeit, an *enormous* array of services) does not make it any less a tax for the benefit of the common

welfare. The government cannot turn a "tax" into a "fee" simply by assessing separate amounts for each government service to be supported. See United States v. City of Huntington, WV, 999 F.2d 71, 73-74 (4th Cir. 1993).

In contrast to a tax, a "fee" usually indicates that the payor has received some privilege not available to the public at large; "a 'fee' connotes a 'benefit.'" National Cable Television Ass'n. v. United States, 415 U.S. at 341. Although the FCC and the Fifth Circuit attempt to point to some special "benefit" that paging carriers will receive from the PSTN, that "benefit" is no different than that of any business that uses the telephone network. See R&O at ¶ 805, Fourth Recon. Order at ¶ 262. Cf. National Cable Televisions Ass'n., 415 U.S. at 340-41.

CMRS carriers have used the PSTN for decades prior to the adoption of the R&O; but, so too has nearly 95% of the U.S. population. The imposition of a tax burden on a select group, wholly unrelated to any benefit received by the group so burdened, is simply unconstitutional. See, e.g., Dane v. Jackson, 256 U.S. 589, 599 (1921); Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897, 901 (10th Cir. 1947).

In addition to violating the Taxing Clause, the FCC's Universal Service program violates the Origination Clause. See Celpage Reply Br. at 15. All bills for raising revenue must originate in the House of Representatives. U.S. Const. art. I, § 7, cl. 1. The Telecom Act, including the Universal Service provisions of Section 254, originated in the Senate.[21] Consequently, since the Universal Service program is a tax, it is also unconstitutional under the Origination Clause.

II. THE STATUTORY PROGRAM IS VOID FOR VAGUENESS.

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[21] See Senate Bill S. 652.

A "void for vagueness" challenge to a statute turns on whether the statute provides "fair warning" to allow one to know what standards apply. As this Court has held, the requirement of fair warning prohibits "exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." Whisenhunt v. Spradlin, 464 U.S. 965, 970 (1983) (quoting A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925)). Furthermore, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1925). The universal service statute and the FCC's rules cannot meet these constitutional standards.

The FCC claims that "economic regulations are afforded considerable deference in the vagueness analysis . . . ." FCC Br. at 147. But, this program contains numerous criminal sanctions and provisions. For example, Section 54.711 of the universal service rules states that "inaccurate or untruthful information contained in the Universal Service Worksheet may lead to prosecution under the criminal provisions of Title 18 of the United States Code." 47 C.F.R. § 54.711(a). And, "[contributors failing to file the Universal Service Worksheet or paying contributions in a timely fashion may be subject to the enforcement provisions of the Communications Act and any other applicable law.

Under any vagueness standard of review, the universal service statute cannot pass constitutional muster. The statute provides no guidance as to who must pay these universal service assessments, or the amount owed. This statute is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of

conduct is specified at all." Coates v. Cincinnati, 402 U.S. 611, 614 (1971). Indeed, the statute does not even define "universal service" in a manner that would be comprehensible to most people. The only faint attempt at defining "universal service" in the statute is this: "Universal service is an evolving level of telecommunications service that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1).

As the Fifth Circuit acknowledged, the FCC has been given virtual *carte blanche* to define "universal service" as it sees fit, which may include access to Internet services, cellular telephone service, paging services, satellite and cable TV-based "communications" services, Internet for children, inside wiring, and other yet to be imagined telecommunications and non-telecommunications services. Texas OPUC, 183 F.3d at 442, n.93. The FCC concedes that it can impose payment obligations to support even the janitorial services attendant to some of these school and library programs. Id. at n. 93. All of these services, with the exception of paging, are covered in one form or another by the FCC's universal service rules. See 47 C.F.R. § 54.101(a), (b); 47 C.F.R. §§ 54.503, 54.517(b) (support for Internet access, and installation and maintenance of internal connections for schools and libraries); 47 C.F.R. § 54.601(c) (rural health care support available for telecommunications services of bandwidths up to and including 1.544 Mbps and toll free Internet access).

By contrast, the historic use of the term "universal service," that is, "plain old telephone service" in every household, would be entirely unrecognizable to even the most sophisticated reader of the FCC's universal service rules. See, e.g., MTS and WATS Market Structure (Part 1 of 2), 93 F.C.C.2d 241, ¶¶ 82-83 (1983); Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 6

F.C.C.R. 2936, ¶ 1 (1991).

No "reasonable person" of "common intelligence" could know or surmise from the previous universal service program, that the FCC would adopt such a new and expansive definition of "universal service" as it has. See Smith v. Gogeon, 415 U.S. 566, 572 n.8 (1974) (a law is void for vagueness if persons of common intelligence must guess at its meaning); and Celpage Br. at 25-27. Indeed, many Members of Congress and FCC Commissioners have expressed dismay at the FCC's overly expansive interpretation of this vague statute. Proposed Fourth Quarter 1999 Universal Service Factors, DA 99-1857, Dissenting Statement of Harold Furchtgott-Roth (rel. Sept. 10, 1999).[22]

The statute does not tell the FCC how much money it must raise, or when it has met the program's objectives. The statute does not tell the FCC what tax rates to charge; the FCC can pick any it chooses. In fact, the FCC twice dramatically modified the USF rates in only the first year of the program. *Federal-State Joint Board on Universal Service*, Third Order on Reconsideration, FCC 97-411, 12 F.C.C.R. 22801 (rel. Dec. 16, 1997) ("Third Recon. Order"). Once, in apparent response to Congressional outrage, the agency cut the contribution target by nearly 50%, with little explanation. Id. Since then, the FCC has nearly doubled the rate. See Twelfth Recon. Order, Statement of Commr. Harold Furchtgott-Roth (stating that the Order raised the e-rate contribution factor from .57% to .99%).

The statute provides virtually no guidance to the FCC; the meaning of "universal service" was left open to speculation,

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[22] See also FCC Raises "Gore Tax" $900 Million, Press Release of Senator Conrad Burns, <http://www.senate.gov/~burns/p990527c.htm> (May 27, 1999); Statement of Congressman John D. Dingell on FCC's E-Rate Funding Proposal, <http://www.house.gov/commerce_democrats/press/106nr2.htm> (May 5, 1999).

or to the whims and preferences of five FCC Commissioners. The statute therefore violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 358 (1983).[23]

There is nothing in the statute to restrain this agency from assessing universal service taxes against anyone it chooses; indeed, the FCC has imposed payment obligations on non-telecommunications carriers. Fourth Recon. Order at ¶¶ 276-77. If Congress had intended the program to be limited only to telecommunications "*carriers*," it presumably would have used that term, which it employed in Section 254(d) of the Act. Compare 47 U.S.C. § 254(b)(4), with 47 U.S.C. §254(d). Instead, section 254(b)(4) broadly states that "[a]ll *providers* of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(b)(4) (emphasis added). That language covers virtually every business in the United States.

The fact is that the FCC has already extended Universal Service obligations to non-common carrier, private networks. Although it has decided "not [to] exercise [its] permissive authority to require systems integrators, broadcasters and non-project schools, libraries and rural health care providers to contribute to universal service," Fourth Recon. Order at ¶¶ 276-77, the FCC could assess these taxes against an even broader

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[23] A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. Kolender v. Lawson, 461 U.S. at 357. Of these, "the more important aspect of vagueness doctrine 'is ... the requirement that a legislature establish minimal guidelines to govern law enforcement.' " Id., at 358 (quoting Smith v. Goguen, 415 U.S. at 574-575).

array of non-telecommunications entities.[24] The FCC obviously believes that it could extend universal service obligations to non-telecommunications carriers; and, the statute does not clearly prohibit such an expansive interpretation. Consequently, the entire statutory program is unconstitutionally vague.

III. THE FCC'S DETERMINATION THAT STATES MAY IMPOSE UNIVERSAL SERVICE OBLIGATIONS ON CMRS PROVIDERS WAS CLEARLY ERRONEOUS.

The FCC determined that, in adopting their own Universal Service programs, the states may impose fifty or more disparate contribution requirements on CMRS carriers. R&O, ¶ 791; Fourth Recon. Order at ¶ 303. That interpretation of the statute was upheld by the D.C. Circuit in Cellular Telecommunications Industry Association v. FCC, 168 F.3d 1332 (D.C.Cir. 1999). The Fifth Circuit, despite acknowledging Celpage's "compelling argument," came to the same conclusions. Texas OPUC, 183 F.3d at 430-31. These findings flatly contradict the express language of Section 332 of the Act.

Section 332(c)(3) of the Act provides, in pertinent part, the following:

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[24] Statement of Comm'r. Furchtgott-Roth Regarding the Clarification/Reiteration of "Services" Eligible for Discounts to the Schools and Libraries Fund, at 3 (rel. June 11, 1998) (<http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr832.html>) ("One final note of caution to the network equipment manufacturing industry. As with any instance of corporate welfare, the beneficiaries - - here the hardware and software providers in that industry - - are on a slippery slope. ... Network equipment manufacturers should beware, as many have already argued that it is unfair to allow an industry to take from a public fund without having the corresponding obligation to contribute to it.").

> Notwithstanding [47 U.S.C.] sections 2(b) and 221(b), no State or local government shall have authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. 47 U.S.C. § 332(c)(3) (emphasis added).

The quoted language of Section 332(c)(3) could not be more clear: CMRS providers are subject to state-imposed Universal Service requirements *only* "where" the CMRS services to be subjected to those requirements "are a substitute" for traditional, local exchange services "for a substantial portion of the communications within" the state seeking to impose those requirements. Unless the statutory conditions are met, a state may not impose upon CMRS providers any requirements "necessary to ensure" Universal Service. That quoted language remains in the Act, and was not amended by the Universal Service provisions of the Telecom Act. See 47 U.S.C. § 254.

The FCC's strained interpretation reads Section 332(c)(3)'s clear language entirely out of the Act, which the FCC may not do. See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)

("If the intent of Congress is clear, that is the end of the matter; for . . . the agency, must give effect to the unambiguously expressed intent of Congress"). See also Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (It is an "elementary canon of construction that a statute should be interpreted so as to not render one part inoperative.").

The FCC ignored the broad preemptive scope and plain terms of Section 332(c)(3). That provision divested the states of intrastate jurisdiction over the most fundamental aspects of the CMRS business, namely prices and market entry, which the states had traditionally wielded under Sections 2(b) and 221(b) of the Act. In adopting that provision, Congress expressed its view that land mobile services are inherently interstate in nature. See H.R. Rep. No. 103-711, 103rd Cong., 1st Sess. (1993), at 260.

In contrast to the broad preemptive intent underlying Section 332(c)(3), the legislative history of Section 254(f) does not evince a Congressional intent to expand State jurisdiction over CMRS carriers with regard to universal service. Rather, the limited discussion of this provision in the legislative history indicates a Congressional concern only that existing State authority with regard to universal service be "preserved." See Con. Rep. 104-458, 104th Cong., 1st Sess. (1996), at 132 ("State authority with respect to Universal Service is specifically preserved under new Section 254(f)"); see also Senate Rep. No. 104-23, 104th Cong., 1st Sess. (1995), at 11. This conclusion is reinforced by Section 601(c) of the Telecom Act, which forbids construing the 1996 Act to modify existing law unless expressly so provided.

The FCC determined that "a state is not required to demonstrate that CMRS is a substitute for land line service" when imposing Universal Service mechanisms pursuant to Section 254(f). Fourth Recon. Order at ¶ 301, quoting

Pittencrieff Communications, Inc., Memorandum Opinion and Order, File No. WTB/POL 96-2, FCC 97-343 (rel. October 2, 1997). This strained reading of the language of Section 332 is a wholly unreasonable interpretation and this Court owes it no deference.

If Congress had believed that Universal Service contributions were more accurately characterized as "other terms and conditions" of CMRS services, rather than a form of preempted rate regulation, there would have been no need for Congress to have added the second sentence of Section 332(c)(3). It would make little sense to state in the second sentence of Section 332(c)(3) that "nothing in this subparagraph" prevented the states from imposing an obligation of the kind that they are allowed to impose under the first sentence of the same subparagraph. Moreover, there would have been no logical reason to add the qualifying phrase, "where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State," if the states had the unqualified power to impose Universal Service obligations as "other terms and conditions" under the first sentence of Section 332(c)(3). The FCC's interpretation renders the second sentence of Section 332(c)(3) inoperative, contrary to basic rules of statutory construction. Department of Revenue v. ACF Indust., 510 U.S. 332, 340-41 (1994).

The FCC's tortured reading of Sections 332(c)(3) and 254(b) is not necessary to reconcile those two provisions. Section 254(f) permits a state to impose Universal Service obligations upon any telecommunications carrier subject to that state's jurisdiction; CMRS carriers simply are not within that group of carriers. The power granted by Section 254(f) is hardly a nullity: it extends to the majority of telecommunications carriers, including LECs, IXCs, and fixed-service radio common carriers (for example, microwave)

providing intrastate services, as well as to resellers of those services. Section 254(f) clarifies that the federal Universal Service scheme does not impinge on the states' authority over the carriers they regulate under Section 2(b), as long as the Universal Service obligations imposed by the states pursuant to that authority are equitable, non-discriminatory, and do not contravene federal law.

Consequently, the FCC's determination that the states may impose intrastate Universal Service obligations upon CMRS providers cannot be reconciled with the language of Sections 332(c)(3), and 2(b), nor with the legislative history of the Telecom Act. That determination must be reversed.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix 1

183 F.3d 393

TEXAS OFFICE OF PUBLIC UTILITY COUNSEL; Celpage, Inc.; Southwestern Bell Telephone Company; GTE Midwest, Inc.; Louisiana Public Service Commission, an Executive Branch Department of the State of Louisiana; COMSAT Corporation; People of the State of California; Public Utilities Commission of the State of California; Iowa Utilities Board; South Dakota Public Utilities Commission; Pennsylvania Public Utility Commission; Bell Atlantic Telephone Companies; Vermont Department of Public Service; GTE Service Corporation; GTE Alaska Incorporated; GTE Arkansas Incorporated; GTE California Incorporated; GTE Florida Incorporated; GTE South Incorporated; GTE Southwest Incorporated; GTE North Incorporated; GTE Northwest Incorporated; GTE Hawaiian Telephone Company Incorporated; GTE West Coast Incorporated; Contel of California, Inc.; Contel of Minnesota, Inc.; Contel of the South, Inc.; Public Service Commission of Nevada; Cincinnati Bell Telephone Company; Florida Public Service Commission; People of the State of New York; Public Service Commission of the State of New York; and The State Corporation Commission of the State of Kansas, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 97-60421.
United States Court of Appeals,
Fifth Circuit.

July 30, 1999.

Appendix 2

Petitions for Review of a Final Order of the Federal Communications Commission.

Before SMITH, DUHE and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This is a consolidated challenge to the most recent attempt of the Federal Communications Commission ("FCC") to implement provisions of the landmark 1996 Telecommunications Act (the "Act"). [FN1] Petitioners, joined by numerous intervenors, challenge several aspects of the FCC's Universal Service Order (the "Order") implementing the provisions of the Act codified at 47 U.S.C. § 254. We grant the petition for review in part, deny it in part, affirm in part, reverse in part, and remand in part.

> FN1. Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of title 47, United States Code).

I. BACKGROUND.

A. THE 1996 ACT AND THE UNIVERSAL SERVICE ORDER.

Beginning with the passage of the Communications Act of 1934 (the "1934 Act"), Congress has made universal service a basic goal of telecommunications regulation. As Section 1 of the 1934 Act stated, the FCC was created

> [f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient,

> Nation- wide, and world-wide wire and radio communication service with adequate*406 facilities at reasonable charges....
> 47 U.S.C. § 151 (as amended).

Armed with this statutory mandate, the FCC historically has focused on increasing the availability of reasonably priced, basic telephone service via the landline telecommunications network. [FN2] Rather than relying on market forces alone, the agency has used a combination of implicit and explicit subsidies to achieve its goal of greater telephone subscribership. Explicit subsidies provide carriers or individuals with specific grants that can be used to pay for or reduce the charges for telephone service. This form of subsidy includes using revenues from line charges on end-users to subsidize high-cost service directly and to support the Lifeline Assistance program for low-income subscribers.

> FN2. In economic terms, universal service programs are justified as a way to address a "market failure." While the carriers have little incentive to expand the telecommunications infrastructure into areas of low population density or geographic isolation, each individual user of the network benefits from the greatest possible number of users. See Eli M. Noam, Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?, 97 COLUM. L.REV. 955, 958-59 (1997).

Implicit subsidies are more complicated and involve the manipulation of rates for some customers to subsidize more affordable rates for others. For example, the regulators may require the carrier to charge "above-cost" rates to low-cost, profitable urban customers to offer the "below-cost" rates to expensive, unprofitable rural customers.

For obvious reasons, this system of implicit subsidies can work well only under regulated conditions. In a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers. Because opening local telephone markets to competition is a principal objective of the Act, Congress recognized that the universal service system of implicit subsidies would have to be re-examined.

To attain the goal of local competition while preserving universal service, Congress directed the FCC to replace the patchwork of explicit and implicit subsidies with "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). Congress also specified new universal service support for schools, libraries, and rural health care providers. See 47 U.S.C. § 254(h). It then directed the FCC to define such a system and to establish a timetable for implementation within fifteen months of the passage of the Act.

The Federal-State Joint Board (the "Joint Board"), created by the Act to coordinate federal and state regulatory interests, issued two recommendations on how to implement the universal service provisions. [FN3] The FCC met the statutory deadline when it issued the Order on May 8, 1997. [FN4] Since that time, the agency has issued seven reconsideration orders (the last one on May 28, 1999) and has made ***407** two reports to Congress regarding the Order.

FN3. The first Recommended Decision was issued on November 8, 1996 (12 FCC Rcd 87 (1996)), the second Recommended Decision on November 25, 1998 (13 FCC Rcd 24744 (1998)).

FN4. Congress also directed that the FCC establish rules to achieve the local competition goals of the Act within six months of the Act's enactment. The agency met this deadline when it issued the Local Competition Order on August 8, 1996. Almost all parts of this order were affirmed by the Supreme Court. See AT & T v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).
On the same day it issued the Order, the FCC released the Access Charge Order. Access charges are the charges assessed between local exchange companies (LEC's) and interexchange companies (IXC's) for the use of one network by callers from the other network. Challenges to this order were also consolidated before the Eighth Circuit. See Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir.1998).

The FCC designated a set of core services eligible for universal service support, proposed a mechanism for supporting those services, and established a timetable for implementation. See Order ¶¶ 21-42. Pursuant to the Act, the agency developed rules for modifying the existing system of support for high- cost service areas and created new support programs for schools, libraries, and health care facilities.

1. HIGH-COST SUPPORT.

The FCC's plans for changing the high-cost support system required it to resolve a number of complicated issues, including (1) what methodology to use for calculating high-cost support; (2) how to allocate costs between the states and the federal government; (3) which carriers should be required to contribute to the support system; and (4) when to implement the high-cost support program. The agency

resolved the question of how to calculate the proper amount of high-cost support by accepting the Joint Board's second recommendation to identify areas where the forward-looking cost of service exceeds a cost-based benchmark and to provide extra support to any state that cannot maintain reasonable comparability. [FN5] See Second Recommended Decision ¶ 19; Seventh Report and Order ¶ 61 n.157.

> FN5. This methodology is a departure from the revenue-based national benchmark proposed in the Order. The revenue-based benchmark was challenged for including discretionary revenues in its calculation and for its nationwide scope. Because of the revisions proposed by the Joint Board's Second Recommended Decision, we now consider those challenges to the prior revenue-based methodology moot. See infra part III.A.1.b.

Most importantly, the FCC decided to use the "forward-looking" costs to calculate the relevant costs of a carrier serving a given geographical area. In other words, to encourage carriers to act efficiently, the agency would base its calculation on the costs an efficient carrier would incur (rather than the costs the incumbent carriers historically have incurred). [FN6]

> FN6. The agency made a decision to provide only 25% of the funds for high- cost support, leaving the state commissions ("the states") to provide the rest of the funds. According to the FCC, the states traditionally have provided a majority of universal service support, and if the agency were to fund all the high-cost support, it would overcompensate carriers.

Moreover, the FCC claims that the 25% figure approximates the costs that historically have been assigned to the interstate jurisdiction. See Order ¶ 201.

The Joint Board, however, recommended that the FCC scrap the 25%/75% division of responsibility in favor of a more flexible plan of allocation. See Second Recommended Decision ¶¶ 4-5, 41-46. The FCC accepted the Joint Board's recommendation and eliminated the 25/75 rule on May 27, 1999, thereby mooting the issue for this court. See infra part III.A.1.c. See also Seventh Report and Order ¶ 3 ("We explicitly reconsider and repudiate any suggestion in the First Report and Order that federal support should be limited to 25 percent of the difference between the benchmark and forward-looking cost estimates....").

The FCC developed rules for determining which carriers should be required to contribute to the interstate universal service support system and how their contributions should be calculated. It decided to require all telecommunications carriers and certain non-telecommunications carriers to contribute in proportion to their share of end-user telecommunications revenues. See Order ¶¶ 39-42. The agency determined that to reduce the burden on individual carriers' prices, the carriers' contribution base should be as broad as possible. See Order ¶ 783. Therefore, the agency required contributing carriers to include their international telecommunications revenues in their contribution base and rejected claims by certain carriers, [FN7] which do not receive direct subsidies from ***408** the support program, seeking an exemption from making any contributions. See Order ¶ 805.

FN7. These carriers include wireless service providers of paging and commercial mobile radio service ("CMRS"). The FCC also rejected a claim by CMRS providers seeking an exemption from making contributions to state support funds.

Finally, the FCC adopted a timetable for implementing its high-cost support plan. Because it has not yet developed an accurate assessment of forward-looking costs, it delayed implementation of its support program for non-rural carriers until January 1, 2000. [FN8] Additionally, because the agency believes it will take even longer to develop accurate forward-looking cost models for rural carriers, it delayed the implementation of its new support plan for rural carriers to "no sooner than January 1, 2001." See Order ¶ 204.

FN8. In the original order, the FCC had planned implementation by January 1, 1999. This date was delayed until July 1, 1999, and again to January 1, 2000. See Seventh Report and Order ¶ 5.

During this delay in implementation, the FCC decided that carriers will continue to receive support at the levels generated by existing universal support programs. According to the agency, this gradual, phased-in plan for implementing its new high-cost support system meets the Act's requirement of a "specific timetable for completion." See 47 U.S.C. § 254(a)(2).

2. SCHOOLS AND LIBRARIES.

Pursuant to § 254(h), the FCC adopted rules implementing new programs for schools, libraries, and health care facilities, in particular by providing universal service support for

internet access and internal connections in schools and libraries. See Order ¶ 436. The agency decided that any entity, including non-telecommunications carriers, that provides internet access or internal connections to schools and libraries will receive universal service support. See Order ¶ 594.

To fund the new § 254(h) programs, the FCC accepted the Joint Board's recommendation to assess the interstate and intrastate revenues of providers of interstate telecommunications service. See Order ¶ 808. Because many states do not already have similar support programs for schools and libraries, the agency justified its inclusion of intrastate revenues as necessary to ensure adequate funding for § 254(h) programs.

B. CHALLENGES TO THE ORDER.

On September 5, 1997, petitioner Celpage Inc. filed a motion in this court to stay the Order. We denied that motion on October 16, 1997, and rejected a similar motion by various rural telephone companies on December 31, 1997. Their petitions, along with challenges to the Order by other petitioners, were consolidated in this court.

There are two sets of challenges to the Order. The first regards the FCC's plan for replacing the current mixture of explicit and implicit subsidies with an explicit universal service support system for high-cost areas. On both statutory and constitutional grounds, petitioners attack (1) the methodology for calculating support under the plan; (2) the allocation of funding responsibilities between the FCC and the states; and (3) the agency's restrictions on how carriers can recover universal service costs.

Other petitioners attack the FCC's high-cost support plan as an encroachment on state authority over intrastate telecommunications regulation because it restricts state eligibility requirements and imposes a "no disconnect" rule for low-income telephone subscribers. Petitioners also challenge, for lack of specificity and for failing to delay implementation of the plan for some rural carriers, the FCC's timetable for implementing the new universal service plan. Additionally, petitioners challenge the FCC's system for assessing contributions, arguing that it improperly includes CMRS providers and unfairly assesses carriers on the basis of their international and interstate revenues.

The second set of challenges regards the FCC's proposal for implementing § 254(h) ***409** programs supporting schools, libraries, and health care providers. Petitioners claim that the FCC impermissibly expanded the scope of § 254(h) support to include the provision of internet access and internal connections. Moreover, they attack the FCC's statutory authority to provide such support to non-telecommunications providers.

Additionally, petitioners charge that the agency encroached on state authority to implement state support programs for schools and libraries and failed to designate which telecommunications services will receive § 254(h) support. They also argue that the FCC exceeded its statutory authority by requiring subsidies for toll-free telephone calls to internet service providers by non- rural health care providers. Finally, they attack the FCC's § 254(h) contribution system because it assesses both the intrastate and interstate revenues of carriers. [FN9]

> FN9. The FCC also determined that it could require carriers to contribute, based on both interstate and

intrastate revenues, to high-cost support as well as § 254(h) support. But for policy reasons, it decided to assess contributions on both interstate and intrastate revenues for support of § 254(h) programs only. It maintains, however, that it may impose similar assessments for high-cost support as well. See Seventh Report and Order ¶¶ 87-90.
We review the states' challenge to the FCC's claim of jurisdictional authority over intrastate rates in the context of its actions regarding support of the § 254(h) programs, but we also discuss its implications for FCC jurisdictional authority for support of high-cost programs. See infra, part III.B.6.

We affirm most of the FCC's decisions regarding its implementation of the high-cost support system, concluding, for the most part, that the Order violates neither the statutory requirements nor the Constitution. We remand for further consideration, however, as to the FCC's decision to assess contributions from carriers based on both international and interstate revenues. We also reverse (1) the requirement that ILEC's recover their contributions from access charges and (2) the blanket prohibition on additional state eligibility requirements for carriers receiving high-cost support.

On jurisdictional grounds, we reverse the rule prohibiting local telephone service providers from disconnecting low-income subscribers. We also conclude that the agency exceeded its jurisdictional authority when it assessed contributions for § 254(h) "schools and libraries" programs based on the combined intrastate and interstate revenues of interstate telecommunications providers and when it asserted its jurisdictional authority to do the same on behalf of high-cost support.

II. STANDARD OF REVIEW.

[1] When deciding whether the FCC has the statutory authority to adopt the rules included in the Order, we review the agency's interpretation under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), by first deciding whether "Congress has directly spoken to the precise question at issue," id. at 842, 104 S.Ct. 2778. If so, we "give effect to the unambiguously expressed intent of Congress." Id. at 842-43, 104 S.Ct. 2778. In this situation, we reverse an agency's interpretation if it does not conform to the plain meaning of the statute. This level of review is often called "Chevron step-one" review.

[2][3] Where the statute is silent or ambiguous, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S.Ct. 2778. We may reverse the agency's construction of an ambiguous or silent provision only if we find it "arbitrary, capricious or manifestly contrary to the statute." Id. at 844, 104 S.Ct. 2778. That is to say, we will sustain an agency interpretation of an ambiguous statute if the interpretation "is based on a permissible construction of the statute." ***410** Id. at 843, 104 S.Ct. 2778. We refer to this more deferential level of review as "Chevron step-two" review.

[4] The Administrative Procedure Act ("APA") also authorizes us to reverse an agency's action if it acted arbitrarily or capriciously in adopting its interpretation by failing to give a reasonable explanation for how it reached its decision. See 5 U.S.C. § 706(2)(A) (1994); see also Harris v. United States, 19 F.3d 1090 (5th Cir.1994). "Arbitrary and capricious" review under the APA differs from Chevron step-

two review, because it focuses on the reasonability of the agency's decision-making processes rather than on the reasonability of its interpretation. [FN10]

> FN10. See Arent v. Shalala, 70 F.3d 610, 614-16 (D.C.Cir.1995); see also Gary Lawson, Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions, 48 RUTGERS L.REV. 313 (1996). We recognize the difference between Chevron step-two review and the APA's arbitrary and capricious review is not always obvious. Indeed, the different standards of review overlap, because both require a reviewing court to decide whether the agency action is "manifestly contrary to the statute" (Chevron) or "otherwise not in accordance with law." (APA). See Arent, 70 F.3d at 615 & n. 6.

[5] Finally, we do not give the FCC's actions the usual deference when reviewing a potential violation of a constitutional right. "The intent of Congress in 5 U.S.C. § 706(2)(B) was that courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making." Porter v. Califano, 592 F.2d 770, 780 (5th Cir.1979).

III. ANALYSIS.

A. HIGH-COST SUPPORT.

1. METHODOLOGY FOR CALCULATING SUPPORT FOR HIGH-COST AREAS.

a. FORWARD-LOOKING COST-OF-SERVICE METHODOLOGY.

[6][7] GTE and Southwestern Bell (collectively "GTE") and the FCC engage in a fairly complex economic debate over the

merits of calculating costs using the forward-looking cost models based on the "least cost, most efficient" carrier. [FN11] Because ***411** incumbent local exchange carriers ("ILEC's") such as GTE will receive their subsidies, under the new system, based on the difference between the costs of providing service to a high-cost region and the revenue that could be derived from that service, GTE fears that using the costs of a hypothetical most-efficient carrier will significantly reduce the amount of universal service support it receives.

> FN11. As an initial matter, the FCC asks us to dismiss all challenges to its methodology for calculating high-cost support, claiming that such challenges are not ripe in light of the Joint Board's Second Recommended Decision. The Joint Board advised the agency to make substantial revisions in the high-cost support methodology, including the elimination of the 25%/75% division between federal and state contributions and the modification of the revenue benchmark used to calculate high-cost support. The FCC accepted these recommendations, and we dismiss challenges to those issues as moot. See infra parts III.A.1.b and c.
>
> But the FCC did not modify other portions of the Order, including its use of forward-looking cost models. See Seventh Report and Order ¶ 48. We agree with GTE that the mere existence of a Joint Board recommendation does not permit the FCC to block all judicial review of its high-cost methodology, especially after the agency has issued its order implementing these recommendations.
>
> The Supreme Court has consistently endorsed judicial review of final agency actions. "Although ... the FCC

regulation could properly be characterized as a statement only of intentions, the Court held that 'such regulations have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack....' " Abbott Lab. v. Gardner, 387 U.S. 136, 150, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (quoting Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 418-19, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942)).

Additionally, we consider four factors when evaluating a claim of lack of ripeness in the administrative context: (1) whether the issues are purely legal; (2) whether the issues are based on a final agency action; (3) whether the controversy has a direct and immediate impact on the plaintiff; and (4) whether the litigation will expedite, rather than delay or impede, effective enforcement by the agency. See Dresser Indus. v. United States, 596 F.2d 1231, 1235 (5th Cir.1979). To find a case ripe, we require the party bringing the challenge (here, GTE) to establish all four factors in seeking judicial review. See Merchants Fast Motor Lines, Inc. v. Interstate Commerce Comm'n, 5 F.3d 911, 920 (5th Cir.1993).

The FCC does not claim that the issues presented are not purely legal, and we have already explained why, under Abbott Laboratories, the Order remains a final agency action. There is no indication that the petitioners are currently unaffected by the legal force of the Order. Finally, we agree with GTE that because the FCC has had ample time (three years) and

opportunity to implement the Order, judicial guidance on the legality of the Order will not delay or impede the agency's ability to carry out its statutory duties.

i. STATUTORY INTERPRETATION.

The question, of course, is not whether it is good policy for the FCC to use such cost models, [FN12] but whether the decision to adopt this methodology conforms to the plain language of the statute. If the language is ambiguous, we must then ask whether the use of forward-looking cost models is reasonable given the terms of the statute and the deference the FCC must be afforded under Chevron. Additionally, we must consider whether the agency's actions in reaching its decision are "arbitrary and capricious" under the APA. See 5 U.S.C. § 706(2)(A).

FN12. GTE refers us to Justice Brandeis's dissent (joined by Justice Holmes) in Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981 (1923), criticizing use of "fair value" (another version of forward-looking cost models) in ratemaking. GTE notes that Justice Breyer has endorsed Justice Brandeis's criticisms. Even in his separate opinion in Iowa Utilities, however, Justice Breyer did not advocate that the Court prohibit the FCC from adopting forward-looking cost models. See Iowa Utilities, 119 S.Ct. at 752 (Breyer, J., concurring in part and dissenting in part) ("These examples do not show that the FCC's rules are themselves unreasonable").

Most importantly, the Brandeis criticism of "fair value" has never reflected the view of a majority of the Court, which on several occasions has declined to

adopt Justice Brandeis's views on this question. See Federal Power Comm'n v. Texaco Inc., 417 U.S. 380, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). Instead, the Court consistently has refused to "designat[e][ ] a single theory of ratemaking [that] would unnecessarily foreclose alternatives which could benefit both consumers and investors." Duquesne Light Co. v. Barasch, 488 U.S. 299, 316, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). In fact, the Court has explicitly sustained similar cost models not based on historical costs. See Mobil Oil Exploration & Producing Southeast Inc. v. United Distrib. Cos., 498 U.S. 211, 224-25 n. 5, 111 S.Ct. 615, 112 L.Ed.2d 636 (1991) (indicating that similar non-historical based cost model was not arbitrary, capricious, or manifestly contrary to the statute at issue.).

We conclude that the plain language is ambiguous as to whether the FCC's cost models are permitted. We then decide that under Chevron step-two, the FCC's forward-looking cost models are authorized under their reasonable interpretations of the statutory language. Finally, we do not conclude that the FCC acted in a "arbitrary and capricious" manner in reaching its decision to adopt forward-looking cost models.

[8] GTE argues that the methodology violates the "equitable and nondiscriminatory" language in § 254(b)(4). We disagree with GTE's claim that the plain language of § 254(b)(4) prohibits the FCC from adopting its methodology.

The section of the statute that GTE relies on represents one

of seven principles identified by the statute as the basis for the agency's universal service policies. Rather than setting up specific conditions or requirements, § 254(b) reflects a Congressional intent to delegate these difficult policy choices to agency discretion: "The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles...." (Emphasis added.) 47 U.S.C. § 254(b).

***412** Moreover, the FCC has offered reasonable explanations for how its use of the forward-looking cost models cannot be characterized as inequitable and discriminatory. For instance, the FCC points out that all carriers, including interexchange carriers ("IXC's") such as AT & T and MCI, are subject to the same cost methodology and must move toward the same efficient cost level to maximize the benefits of universal service support.

[9] The term "sufficient" appears in § 254(e), and the plain language of § 254(e) makes sufficiency of universal service support a direct statutory command rather than a statement of one of several principles. Still, we do not find that the use of the single word "sufficient," even in the language of command, demonstrates Congress's unambiguous intent regarding the forward- looking cost models. We therefore review under Chevron step-two and conclude that the agency has offered reasonable justifications for its adoption of the "most efficient" methodology.

[10] The FCC points to cases in which agencies have adopted similar methodologies to encourage competition. [FN13] It also argues that nothing in the statute defines "sufficient" to mean that universal service support must equal the actual costs incurred by ILEC's. These reasons suffice to survive the reasonableness requirement of Chevron step-two.

FN13. See, e.g., West Tex. Util. Co. v. Burlington N.R.R., Docket No. 41191 (Surface Transp. Bd. May 3, 1996), aff'd sub nom. Burlington N.R.R. v. Surface Transp. Bd., 114 F.3d 206, 213 (D.C.Cir.1997) (sustaining, as reasonable, agency application of "stand alone cost constraints" based on rates that a hypothetical carrier would have to charge to earn a reasonable return).

To be sure, the FCC's reason for adopting this methodology is not just to preserve universal service. Rather, it is also trying to encourage local competition by setting the cost models at the "most efficient" level so that carriers will have the incentive to improve operations. As long as it can reasonably argue that the methodology will provide sufficient support for universal service, however, it is free, under the deference we afford it under Chevron step-two, to adopt a methodology that serves its other goal of encouraging local competition.

ii. "ARBITRARY AND CAPRICIOUS."

[11][12] Arguing that the FCC has departed from its own stated methodology, GTE charges the agency with "arbitrary and capricious" actions under the APA. See 5 U.S.C. § 706(2)(A). The APA's "arbitrary and capricious" standard of review is narrow and requires only a finding that the agency "articulate[d] a rational relationship between the facts found and the choice made." Harris v. United States, 19 F.3d 1090, 1096 (5th Cir.1994).

GTE points out that while the agency has wedded itself to the "most efficient" carrier cost methodology, it used current depreciation schedules to develop its models for projecting forward-looking costs. These schedules are not based on the

actual costs of the current regulated system, but, GTE contends, have been artificially deflated by state regulators so that local carriers recover less than they would in a real, competitive market. Using these artificially-deflated schedules in the cost models disadvantages the ILEC's, because they will not be able to recover their capital costs as they would if free from regulation.

Actually, the FCC has departed from its general "most efficient" methodology by making a number of adjustments to its cost model. For instance, instead of assuming the "most efficient" wire center locations in its cost models, the agency simply made calculations based on whatever wire centers already exist. See Order ¶ 251(1). This allowance actually benefits the ILEC's.

While GTE argues that the FCC's failure to adhere tightly to its "most efficient" ***413** methodology fails the "arbitrary and capricious" test, that test, properly understood, is far less onerous. If the FCC's departures from its methodology "articulate a rational relationship," we will not apply the "arbitrary and capricious" remedy.

[13] The FCC seeks to mitigate the effect of the "most efficient" methodology by accounting for wire centers that already exist. Additionally, and contrary to GTE's assertions, the agency is prescribing a range within which the depreciation schedules must fall, rather than simply adopting the schedules that already exist. For the time being, the FCC will rely on the actual depreciation schedules, because it does not see a prospect of significant competition in the near future in the high-cost markets. See Order ¶ 250(5). Moreover, the agency has committed itself to re-prescribe the range for these schedules every three years. See id. ¶ 250(5) n. 662. These reasons establish enough of a "rational relationship"

with facts presented for the forward-looking cost methodology to pass the APA's arbitrary and capricious test. [FN14]

> FN14. GTE claims that implementing the forward-looking cost methodology will force ILEC's to operate at a loss, and this constitutes an unconstitutional taking under Brooks-Scanlon. GTE's claim has no merit; it has not shown that a taking has occurred or that any taking will be permanent or would be so serious as to be considered "confiscatory." See Duquesne, 488 U.S. at 314, 109 S.Ct. 609. ("[A]n otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it.").
>
> Unlike the situation in Brooks-Scanlon, the circumstance here is that the regulatory entity setting the rules, the FCC, is not requiring the ILEC's to remain open or to charge low rates, thereby forcing them to operate at a permanent loss. See Continental Air Lines v. Dole, 784 F.2d 1245, 1251 (5th Cir.1986) (distinguishing Brooks-Scanlon where agency required loss-making operation for a limited time only).

b. METHODOLOGY FOR CALCULATING THE REVENUE BENCHMARK.

[14][15] GTE challenged the inclusion of revenues from "discretionary" services in the revenue benchmark used to compare costs and revenues for the purposes of universal service support. The Joint Board, however, recently proposed eliminating the entire revenue benchmark in favor of a single national cost benchmark. See Second

Recommended Decision ¶¶ 41-50. The FCC accepted this recommendation.See Seventh Report and Order ¶ 61 ("[W]e reconsider and reject the determination in the First Report and Order that federal support for rate comparability should be determined using a revenue-based benchmark."). [FN15] This decision moots GTE's challenge to the inclusion of discretionary revenues, because no revenues will be used in the calculation of the benchmark. [FN16]

> FN15. Vermont has filed a petition for review of the Seventh Report and Order in the District of Columbia Circuit. See No. 99-1243 (D.C.Cir.). Pursuant to 28 U.S.C. § 2349(a), it thereby has vested that court with exclusive jurisdiction to review the Seventh Report and Order. Unless the District of Columbia Circuit transfers the petition to this court pursuant to 28 U.S.C. § 2112(a), we lack jurisdiction to consider the order on its merits.
> We still retain jurisdiction to the extent that the new order changes or affects the Order that is the subject of this consolidated proceeding. As we explain below, the FCC's repudiation of its revenue benchmarks and the 25% allocation moot the petitioners' chalienges for purposes of this appeal. Petitioners, however, are not precluded, by our dismissal in this proceeding, from filing appeals of the new cost-based benchmark and the new allocation methodology in another proceeding.
>
> FN16. Mootness goes to the heart of our jurisdiction under Article III of the Constitution. Therefore, we must consider mootness even if the parties do not raise it, because "resolution of this question is essential if federal courts are to function within their constitutional spheres of

authority." North Carolina v. Rice, 404 U.S. 244, 245, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

[16][17][18] A case becomes moot if (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably ***414** eradicated the effects of the alleged violation. County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). [FN17] The FCC's new approach eradicates any possible effect of discretionary revenues on the levels of the petitioners' universal service support. [FN18] We therefore dismiss, as moot, GTE's challenge to the use of discretionary revenues in the high-cost support benchmark.

FN17. Even if these conditions are met, there are at least three exceptions to the mootness doctrine. First, courts may assert jurisdiction if the official action being challenged is capable of "repetition, yet evading review." See Nader v. Volpe, 475 F.2d 916, 917 (D.C.Cir.1973). Second, courts also have adjudicated otherwise moot issues if the defendant has voluntarily ceased the challenged activity to avoid judicial resolution and there is a reasonable possibility that the challenged conduct will resume. See Gluth v. Kangas, 951 F.2d 1504, 1507-08 (9th Cir.1991) (refusing to hold voluntary cessation of prison library restrictions moot in light of long history of policy). Finally, courts have avoided mootness where the mooted issue still has collateral or future consequences. See Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 122, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974)

(refusing to moot employer's challenge to state benefits for strikers even though strike had ended, because issue would affect employer's future relations with union).

Only the first and second exceptions are arguably applicable to the FCC's new order, and we do not think either exception applies. The "repetition" exception will not apply unless there is a reasonable expectation that the same litigant will again be subjected to the same action. See DeFunis v. Odegaard, 416 U.S. 312, 315-17, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (mooting student's lawsuit because he will graduate regardless of outcome of litigation). The second exception requires a showing that the challenged conduct will resume. There is little basis for suggesting that the FCC, after a long and torturous process involving a recommendation from the Joint Board and months of deliberation, will reverse itself on the question of revenue benchmarks.

FN18. Reconsideration of agency actions by the implementing agency can moot issues otherwise subject to judicial review because the reviewing court can no longer grant effective relief. See, e.g., Center for Science in the Pub. Interest v. Regan, 727 F.2d 1161, 1164 (D.C.Cir.1984) (holding that a change in position of Department of Treasury regarding labeling of alcoholic beverages mooted federal appeal); see also 15 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 101.96, at 101-179 (3d ed. 1998) ("[A] parallel proceeding in another forum and [ ] resolution of that controversy in that forum will moot the issues presented in the federal action ....

> regardless of whether or not that parallel forum is an administrative proceeding.").

GTE also challenged the FCC's use of a national benchmark for purposes of revenue calculations. Because GTE's challenge focused on the problems of a national revenue benchmark, the FCC's elimination of the revenue benchmark also moots its challenge to the national benchmark.

GTE's basic attack on the national revenue benchmark is that ILEC's operating in states with below-average revenues will be systematically undercompensated by a universal service support system based on a national revenue benchmark. But none of these arguments necessarily applies to a cost-based national benchmark. [FN19] Indeed, the FCC adopted the cost-based national benchmark because it agreed that "revenues may not accurately reflect the level of need for support to enable reasonably comparable rates because states have varying rate-setting methods and goals." Seventh Report and Order ¶ 62.

> FN19. Accord Center for Science in the Pub. Interest, 727 F.2d at 1164 ("Most of the issues presented in these appeals are not necessarily pertinent to examination of the second [administrative action] and may well prove irrelevant in that context.").

Because the subject matter of GTE's appeal--a national revenue benchmark--no longer has any legal force, "[a]ny further judicial pronouncements ... would be purely advisory." See Center for Science in the Public Interest, 727 F.2d at 1164. "We cannot assume jurisdiction to decide a case on the ground that it is the same case as one presented to us, when it is admitted that it is not and when it presents different issues." Id. at 1166 n. 6 (emphasis added).

Therefore, we also dismiss, as moot, the ***415** challenges to the FCC's national revenue benchmark. [FN20]

> FN20. Our conclusion regarding mootness does not conflict with Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir.1974), in which we refused to moot a challenge to the EPA's approval of Georgia's Clean Air Act implementation plan despite the EPA's later decision to withdraw its approval. Because the EPA's reasons for withdrawing approval showed that it still fundamentally disagreed with the petitioners' interpretation of the Clean Air Act's requirements, we asserted jurisdiction.
>
> In this case, the FCC's new order not only alters, but explicitly repudiates, the reasoning behind its use of revenues in calculating the benchmark. All of the petitioners' challenges to the benchmark calculations focused on the unreliability or unfairness of such revenue- based calculations. By eliminating the use of revenues, the petitioners and the FCC no longer fundamentally disagree on the problems that revenues cause in calculating the benchmark for high-cost support.
>
> Thus, Natural Resources Defense Council does not conflict with the reasoning of Center for Science in the Public Interest, 727 F.2d at 1166, in which the court mooted a challenge after the Treasury had implemented a new, superseding regulation containing different reasoning and substantive provisions different from the challenged regulation. In both cases, the courts analyzed whether the intervening agency action represented a substantive shift in an agency's interpretation of its statutory duties.

c. LIMITING THE FEDERAL MECHANISM TO TWENTY-FIVE PERCENT OF UNIVERSAL SERVICE COSTS.

[19] The third step in the FCC's methodology for calculating support to high-cost, non-rural areas allocates 25% of the funding responsibility to the agency, leaving 75% to be provided by the states. In other words, only 25% of the overall funds for the explicit universal support program for high-cost areas will be provided from the funds collected from interstate telephone calls; the rest must be provided by the states, usually through charges on intrastate service. Certain states, [FN21] GTE, and Kansas and Vermont [FN22] challenged this allocation on statutory grounds. Specifically, they question the 25% rule for failing to provide "sufficient" support under § 254(e). Kansas and Vermont also challenged the FCC's 25% allocation decision for lack of notice and for failing to ensure reasonable comparability between rural and urban rates.

> FN21. Nine state commissions--from Texas, California, Florida, Iowa, Louisiana, New York, Nevada, Pennsylvania, and South Dakota--have presented a joint appeal, and we refer to them as "the states."

> FN22. The state commissions of Kansas and Vermont filed a separate appeal. Although both Kansas and Vermont challenge the 25% allocation, only Vermont maintains its challenge to the FCC's transitional support rules for rural carriers. See infra part III.A.6.c.i.

As in the case of arguments against the revenue benchmark,

we do not consider these challenges, because the FCC has accepted the Joint Board's recommendation to scrap the 25%/75% rule. [FN23] The Seventh Report and Order proposes a new methodology that places "no artificial limits on the amount of federal support that is available" when a state cannot by itself maintain reasonable comparability. Seventh Report and Order ¶ 34. This new framework is "a different regulation, containing on its face reasoning not previously articulated by the agency as its policy." Center for Science in the Pub. Interest, 727 F.2d at 1166. Therefore, we dismiss the challenges by all of the petitioners as moot. [FN24]

FN23. See Seventh Report and Order § 3 ("We explicitly reconsider and repudiate any suggestion in the First Report and Order that federal support should be limited to 25 percent of the difference between the benchmark and the forward-looking cost estimates....").

FN24. Vermont invites us to review the Seventh Report and Order 's interpretation of reasonable comparability in the context of that recent order's revised approach to allocating costs between the different states and between the state and federal funds. To the extent that Vermont's "reasonable comparability" arguments were based on a challenge to the 25% allocation, we dismiss its arguments as moot. To the extent its arguments focused on the alleged failure of the FCC to articulate a definition of "reasonable comparability," we would have to examine the merits of the Seventh Report and Order. As we explained, supra n. 16, we cannot review the merits of

that order, because we lack jurisdiction over the merits of the new allocation methodology until it is transferred to this court by the District of Columbia Circuit.

***416** d. PROPERLY CONSULTING WITH THE JOINT BOARD BEFORE AMENDING JURISDICTIONAL SEPARATIONS RULES.

[20] GTE raises an administrative procedural objection to the FCC's adoption of new jurisdictional separations rules [FN25] that propose to end existing high-cost fund support for non-rural carriers on January 1, 1999. [FN26] Instead of arguing that the new rule is arbitrary and capricious, GTE claims that the agency failed properly to refer the matter to the Joint Board, in violation of 47 U.S.C. § 410(c), which states that "[t]he Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations ... to a Federal-State Joint Board."

FN25. "Beginning January 1, 1999, non-rural carriers shall no longer receive support pursuant to this [program]." 47 C.F.R. § 36.601(c).

FN26. This implementation date has now been delayed until January 1, 2000. See Seventh Report and Order ¶ 5.

The FCC responds that it did make a general referral to the Joint Board in March 1996 and that the Joint Board subsequently recommended that the agency replace the existing support mechanisms for non-rural carriers with a new universal service system. The plan to replace the

existing support mechanism, the FCC argues, requires a change in the method of jurisdictional separation, and by recommending the plan, the Joint Board had already considered the jurisdictional effects. [FN27]

> FN27. Jurisdictional separations rules are part of a process whereby it "may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service." Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 356, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). Section 410(c) requires the FCC to consult the Joint Board, but it does not "dictate how costs must be recovered...." See National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1112 n. 19 (D.C.Cir.1984).

GTE and the FCC disagree on the level of specificity needed to fulfill the Joint Board consultation requirement of § 410(c). GTE argues that simply identifying the broad subject of universal service reform did not raise the issue of altering the system that is used to shift costs in many high-cost areas to the interstate jurisdiction. In particular, GTE contends that the Joint Board failed to consider the amounts of the fund allocation between the interstate and intrastate jurisdictions when it considered the plan to implement a new support mechanism.

Although the FCC does not have to raise every possible detail in its referral to the Joint Board, it must show that the Joint Board was aware of the effects on the jurisdictional separations rules of replacing the existing high-cost support system. The plain language of the statute shows that any shift in the allocation of jurisdictional responsibility lies at the heart of § 410(c)'s consultation requirement.

The Joint Board was aware that replacing the existing high-cost support system will affect the jurisdictional separations rules. This is shown by the fact, for instance, that the Joint Board made a detailed discussion of the current jurisdictional separations rules, acknowledging that they "currently assign 25 percent of each LEC's loop costs to the interstate jurisdiction." See First Recommended Decision ¶ 188.

In discussing the comments submitted by affected parties, the Joint Board recognized that the jurisdictional separations rules are part of the old regime of "embedded" or "historical" costs. See id. ¶ 207. Thus, the Joint Board does seem to recognize that the jurisdictional separations rules are part of the old "embedded cost" ***417** system and were developed in the context of allocating the actual costs of developing the local and long- distance networks. By recommending replacing the historical cost system with a forward-looking "most efficient" cost model, the Joint Board must have considered that the jurisdictional separations rules no longer would apply in the same way. Although no detailed discussion appears in the First Recommended Decision, the Joint Board's recognition that the jurisdictional separations rules would be affected by adopting a new cost model fulfills § 410(c)'s consultation requirement. [FN28]

> FN28. The FCC did not arbitrarily and capriciously fail to explain the reason for its amendment of rule 36.601(c). It stated that the new universal service mechanism will replace the old high-cost fund subsidies and that the change will occur on January 1, 1999 (later extended to July 1, 1999 and then to January 1, 2000). The agency's general explanations of the effect of the new support mechanism provide enough of a reason to survive GTE's attack.

2. ELIGIBILITY REQUIREMENTS FOR CARRIERS SEEKING UNIVERSAL SERVICE SUPPORT.

The states and intervenor Southwestern Bell ("SBC") challenge the FCC's reading of the Act's provisions governing eligibility requirements for carriers seeking universal service support. In general, they question the agency's interpretation of § 214(e) as too narrow and restrictive of the ability of state commissions to set their own criteria and exercise their own discretion over a carrier's eligibility.

a. LIMITING THE CRITERIA THAT STATE COMMISSIONS MAY CONSIDER WHEN ASSESSING A CARRIER'S ELIGIBILITY.

[21] Section 214(e) governs the designation of carriers eligible to receive federal universal service support. Section 214(e)(1)(A) and (B) set out the eligibility requirements, and § 214(e)(2) [FN29] governs the designation of eligible carriers by state commissions.

> FN29. The subsection reads:
> A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by a State commission, so long as each additional requesting carrier meets the

> requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

In the Order, the FCC interpreted § 214(e)(2) in this way. With limited exceptions for rural areas, a state commission has no discretion when assessing a carrier's eligibility for federal support. If a carrier satisfies the terms of § 214(e)(1), a state commission must designate it as eligible. Thus, the FCC ruled that a state commission may not impose additional eligibility requirements on a carrier seeking universal service support in non-rural service areas. See Order ¶ 135. The agency does permit the states to impose service quality obligations on local carriers if those obligations are unrelated to a carrier's eligibility to receive federal universal service support. According to the FCC, this interpretation "gives effect to the unambiguously expressed intent of Congress." See Chevron, 467 U.S. at 842- 43, 104 S.Ct. 2778.

The states and SBC offer two lines of attack. First, they argue that the plain language of § 214(e)(2) does not support the FCC's blanket prohibition on additional state eligibility requirements. Second, they say that the FCC exceeded its jurisdictional authority, in violation of 47 U.S.C. § 152(b), by purporting to interfere with the states' regulation of intrastate service. Because we conclude that the agency ***418** erred in prohibiting the states from imposing additional eligibility requirements, we do not reach the states' jurisdictional challenges.

On the plain language front, the states argue that § 214(e)(2) does not unambiguously prohibit them from regulating

carriers receiving federal universal support. Specifically, they contend that Congress did not mean to prohibit the states from imposing service quality standards on eligible carriers. According to the states, the language on which the FCC relies--"[a] State Commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier"--does not expressly circumscribe state authority to add additional eligibility requirements.

The agency's best hope for express authority for its action rests on the statute's use of the word "shall" in § 214(e)(2). Generally speaking, courts have read "shall" as a more direct statutory command than words such as "should" and "may." [FN30] Though we agree that the use of the word "shall" indicates a congressional command, nothing in the statute indicates that this command prohibits states from imposing their own eligibility requirements. Instead, we read § 214(e)(2) as addressing how many carriers a state may designate for a given service area, and not how much discretion a state commission retains to impose eligibility standards.

> FN30. See MCI Telecomm. Corp. v. FCC, 765 F.2d 1186, 1191 (D.C.Cir.1985) (holding that "shall" is "the language of command").

The first sentence requires state commissions to designate at least one common carrier as eligible, but that carrier must still meet the eligibility requirements in § 214(e)(1). The second sentence then confers discretion on the states to designate more than one carrier in rural areas, while requiring them to designate eligible carriers in non-rural areas consistent with the "public interest" requirement. Nothing in the statute, under this reading of the plain language, speaks at all to

whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers. [FN31]

> FN31. To be sure, if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to "designate" a carrier or "designate more than one carrier."

Thus, the FCC erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support. The plain language of the statute speaks to the question of how many carriers a state commission may designate, but nothing in the subsection prohibits the states from imposing their own eligibility requirements. [FN32] This reading makes sense in light of the states' historical role in ensuring service quality standards for local service. Therefore, we reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support.

> FN32. Additionally, § 152(b) of Act instructs us to construe the Act to avoid giving the FCC jurisdiction over "charges, classifications, practices, services, facilities, or regulations for and in connection with intrastate communications services...." 47 U.S.C. § 152(b). See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 376 n. 5, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) ("[Section] 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to

> intrastate service, provides its own rule of statutory construction."); see also discussion of "no disconnect" rule, infra part III.A.3.

b. The Terms of Section 214(e)(5) Governing the Definition of Service Areas.

In their initial brief, the states argued that the FCC had impermissibly encroached on their exclusive authority to ***419** designate service areas for universal service support. The FCC, however, pointed out that ¶ 185 of the Order had only encouraged the states to make certain decisions [FN33] when designating service areas. The agency explicitly denies that the paragraph requires the states to follow its "encouragements." Thus, it appears that the states misinterpreted the FCC's intentions in ¶ 185 and that there is no issue left for us to address.

> FN33. In order to promote competition, the FCC encourages states to adopt the existing study areas of ILECs as service areas for non-rural areas because it would create a significant barrier to entry. The FCC further encourages states to consider designating service areas that the ILECs have not traditionally served, this limiting the ILEC advantage over new entrants.
>
> Order ¶ 185.

[22] The states, however, continue to contest one aspect of the Order regarding the definition of service areas. The FCC maintains that it may establish a different definition of service areas for rural carriers, with the agreement of the states, without having to submit such a new definition first to the Joint Board. The states argue that the plain language of §

214(e)(5) allows the agency to act only "after taking into account recommendations of [the Joint Board]...."

The FCC has two procedural responses and one substantive defense. Because we agree with the FCC that the states have no standing, we do not reach the FCC's other defenses.

The agency argues that the states have no standing to challenge its ruling, because the states have failed to show any harm. [FN34] After all, as the FCC points out, it must still garner the approval of each respective state before a rural service area can be re defined. The states argue that they are harmed because the state members of the Joint Board are denied a chance to participate in the decisionmaking process, so the states are less able to coordinate with each other. They further contend that bypassing the Joint Board denied the states any meaningful participation in revising service area definitions for rural territories.

> FN34. We review the FCC's standing defense, like all constitutional questions, under a de novo standard of review. See 5 U.S.C. § 706 (stating that "a reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions").

This claim is weak, because the states' independent ability to veto particular service areas seems to provide them with a substantial amount of "meaningful participation." This is unlike the situation in the cases the states rely on, in that the states here are not challenging a federal preemption order that threatens their sovereign authority. See California v. FCC, 75 F.3d 1350, 1361 (9th Cir.1996). Therefore, the states lack standing to challenge this portion of the Order.

c. DECLINING TO REQUIRE ELIGIBLE CARRIERS TO

OFFER SUPPORTED SERVICES ON AN UNBUNDLED BASIS.

[23] GTE argues that the FCC's failure to require carriers to "unbundle" their offerings when receiving universal service support violates the congressional intent expressed in § 214(e)(1) under Chevron step-one. "Bundling" refers to a carrier's practice of offering different services together as one package. For instance, a carrier might offer basic phone service as part of a package that includes call-waiting and voicemail.

GTE fears that a new carrier could "cherry pick" high-profit customers by offering only bundled local telephone service packages. Because the intended beneficiaries of universal service are, by definition, less able to afford even basic service, offering expensive bundled packages will allow new carriers to steal wealthier, low-cost customers while leaving ILEC's such as GTE to provide service to everyone else. GTE reasons that Congress, by requiring carriers receiving federal universal service support to advertise the availability of its ***420** supported services, intended to require new carriers to participate in universal service--an intent that would be thwarted by allowing the new carriers to offer bundled services.

The FCC responds that the plain language of the statute is satisfied as long as a carrier offers "services that are supported by Federal universal service mechanisms." 47 U.S.C. 214(e)(1)(A). Except for the advertising requirement, the statute makes no mention of "bundling" or other eligibility criteria. In fact, the FCC argues that because of the exclusive grant of eligibility authority conferred on the states by § 214(e)(2), it cannot impose additional eligibility criteria. Because the statute is silent on the question of

bundling, and because the statute seems to prohibit further eligibility criteria, the agency asks us to give deference to its interpretation of § 214(e) under Chevron step-two.

We agree that the statute's plain language does not reveal Congress's unambiguous intent. It is not evident, however, that the FCC's interpretation of the statute meets even the minimum level of reasonability required in step- two review.

Section 214(e)(1) plainly requires carriers receiving universal service support to offer such supported services to as many customers as possible. Thus, an eligible carrier must offer such services "throughout the service area" and "advertise the availability of such services." This requirement makes sense in light of the new universal service program's goal of maintaining affordable service in a competitive local market. Allowing bundling, however, would completely undermine the goal of the first two requirements, because a carrier could qualify for universal service support by simply offering and then advertising expensive, bundled services to low-income customers who cannot afford it.

The FCC suggests that GTE's problems stem not from bundling but from state- imposed "carrier of last resort" ("COLR") requirements, which prohibit ILEC's such as GTE from disconnecting low-profit consumers and leave ILEC's vulnerable to outside competition. But the elimination of COLR requirements would only further undermine the goal of making basic services available to low income consumers and those in "rural, insular, and high cost areas." See 47 U.S.C. § 254(b)(3). This again would violate the express intent of the universal service program. Without a better explanation for its unreasonable interpretation, we would be inclined to find the FCC's implementation "arbitrary and

capricious and manifestly contrary to the statute." See Chevron, 467 U.S. at 844, 104 S.Ct. 2778.

Fortunately, the agency also has explained that "only an eligible carrier that succeeds in attracting and/or maintaining a customer base to whom it provides universal service will receive universal service support." Order ¶ 138. Therefore, it reasons that if offering only bundled services would price low- income customers out of the market, the carrier offering bundled services would eventually lose universal service support. Thus, the FCC can avoid the problem of providing universal service support to carriers that do not serve high-cost customers for which the support is intended. This explanation supports the FCC's claim that its decision to allow bundling is reasonable under Chevron step-two review.

Though the decision is a close one, we conclude that the FCC's refusal to require eligible carriers to provide unbundled services is neither "arbitrary, capricious," nor "manifestly contrary to the statute." See Chevron, 467 U.S. at 844, 104 S.Ct. 2778. Because the agency will prevent companies from using bundling to receive federal support while avoiding high- cost customers, we do not find its interpretation "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. ***421** 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

3. AUTHORITY TO PROHIBIT CARRIERS FROM DISCONNECTING LOCAL SERVICE TO LOW-INCOME CONSUMERS WHO FAIL TO PAY TOLL CHARGES...

[24] Bell Atlantic and the states challenge the FCC's adoption of a regulation [FN35] prohibiting carriers receiving

universal service support from disconnecting Lifeline services [FN36] from low-income consumers who have failed to pay toll charges. See Order ¶ 390. The petitioners charge that the "no disconnect" rule exceeds the agency's jurisdictional authority under § 2(b) of the 1934 Act, [FN37] which prohibits FCC regulation of intrastate telecommunications service. Because the plain language of the statute expresses Congress's unambiguous intent, we review the agency's interpretation under Chevron step-one.

FN35. 47 C.F.R. § 54.401(b).

FN36. The Lifeline program refers to the FCC's efforts to expand telephone services to qualifying low-income subscribers. The agency defines Lifeline services to include single-party service, voice-grade access to the public switched telephone network, BTMF or its functional digital equivalent, access to directory assistance, and toll-limitation services. See Order ¶ 390.

FN37. "[N]othing in this subchapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier...." 47 U.S.C. § 152(b) (as amended).

The agency has three responses. First, it argues that § 2(b) does not apply where Congress has given the FCC an "unambiguous or straightforward" grant of authority. See Louisiana Pub. Serv. Comm'n, 476 U.S. at 377, 106 S.Ct. 1890. The agency argues that Congress granted such express authority in § 254(b)(3), which directs the FCC to base its

policies on the principle that "low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services...."

As we have discussed, § 254(b) identifies seven principles the FCC should consider in developing its policies; it hardly constitutes a series of specific statutory commands. Indeed, we have avoided relying on the aspirational language in § 254(b) to bind the FCC to adopt certain cost methodologies for calculating universal service support. [FN38]

FN38. See supra part III.A.1.a.i.

[25] Just as we declined to read § 254(b) as an inexorable statutory command against the FCC, we decline to read it as a grant of plenary power overriding other portions of the Act. The agency has no "unambiguous or straightforward" grant of authority to override the limits set by § 2(b), and, accordingly, it has no jurisdiction to adopt the "no disconnect" rule on the basis of the vague, general language of § 254(b)(3). [FN39]

FN39. The SBC intervenors challenge a related FCC rule prohibiting the practice of requiring deposits from customers initiating service with toll- blocking for interstate service. Unfortunately for SBC, none of the petitioners on this issue (the states and Bell Atlantic) raised a challenge to this similar but separate rule in the FCC proceeding. Therefore, we cannot consider it on appeal. See United Gas Pipe Line Co. v. FERC, 824 F.2d 417, 437 (5th Cir.1987).

[26] Second, the FCC contends that the petitioners' jurisdictional challenge is inapposite because the "no disconnect" rule does not purport to regulate intrastate service, but merely prevents the disconnection of interstate

service (and, as a consequence, of intrastate service) for failure to pay toll charges. [FN40] As Bell Atlantic ***422** rightly responds, however, the "no disconnect" rule is a "regulation," because it dictates the circumstances under which local service must be maintained. Therefore, the FCC, by issuing the rule, has acted "with respect to" and "in connection with" intrastate service within the meaning of § 2(b).

> FN40. Bell Atlantic argues that the FCC has waived this argument on appeal. We do not agree. The FCC's brief states that the "no disconnect" rule "does not purport to regulate intrastate service ... but merely to prevent the disconnection of service (including interstate access service) to customers who have failed to pay toll charges." Though weak, this statement preserves the FCC's attempt to exceed its jurisdictional boundaries on the ground that it cannot regulate an interstate matter without also regulating an intrastate matter.

The FCC points out that even if the "no disconnect" rule is a "regulation" within the meaning of § 2(b), courts have sustained agency jurisdiction over similar rules under the "impossibility" exception. In North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.1977), the court upheld FCC regulations permitting local subscribers to connect their telephones to the local loop to make interstate calls. North Carolina previously had required subscribers to use leased telephones and argued that § 2(b) prevented FCC intervention because the vast majority of these calls were intrastate. The court rejected this argument, holding that "the FCC has jurisdiction to prescribe the conditions under which terminal equipment may be interconnected with the interstate telephone line network." Id. at 1048.

Essentially, the FCC asks us to find that the "no disconnect" rule, aimed at regulating interstate service, is impossible to separate from intrastate service. In similar cases, the District of Columbia Circuit has permitted the FCC to intervene in relatively localized service issues [FN41] and has developed a useful framework for analyzing what the petitioners refer to as the "impossibility" exception to § 2(b). See Public Serv. Comm'n v. FCC ("Maryland PSC"), 909 F.2d 1510, 1515 (D.C.Cir.1990).

> FN41. See, e.g., Public Util. Comm'n v. FCC, 886 F.2d 1325 (D.C.Cir.1989); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104 (D.C.Cir.1989); National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422 (D.C.Cir.1989).

To permit the FCC to preempt state regulation of whether to cut off low-income subscribers, that circuit requires the agency to show that "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of intrastate aspects." Maryland PSC, 909 F.2d at 1515 (internal quotations and citations omitted). This framework creates a properly narrow exception to § 2(b) that allows the FCC to preempt state regulation only when it has shown it cannot carry out its authorized federal objectives without encroaching on state autonomy.

Applying this framework to the "no disconnect" rule, we agree with Bell Atlantic that the FCC has failed to show why allowing the states to control disconnections from local service would "negate the exercise of the FCC's lawful

authority...." As Bell Atlantic points out, the agency offered only a brief explanation of what lawfully authorized federal objectives are being served by the "no disconnect" rule and why it is necessary to preempt local authority to achieve these objectives.

In the Order, the FCC simply states that the "no disconnect" rule advances its goal of increasing subscribership and that it will improve the competitiveness of the market for billing and collection of toll charges. See Order ¶¶ 390- 391. But the agency has not adequately explained, in either its brief or its Order, why these goals would be "negated" by allowing the states to control disconnection of local subscribers. In contrast to what occurred in Maryland PSC, where the court allowed the FCC to assert juris diction to prevent ILEC's from shifting local costs to interstate consumers, the FCC has offered no similar explanation of how protecting interstate service requires imposition of a "no disconnect" rule. Therefore, we decline ***423** to allow the agency to assert jurisdiction over the disconnection of local service based on the impossibility exception.

Finally, the FCC argues that in the wake of Iowa Utilities, it has jurisdiction over all areas, including intrastate matters, to which the Act applies. In Iowa Utilities, the Court rejected jurisdictional challenges to the portions of the FCC's Local Competition Order implementing §§ 251 and 252 of the Act, which govern the interconnection of new local service carriers with the ILEC's and establish procedures for negotiating, arbitrating, and approving any interconnection agreements. As in the instant case, petitioners challenged the FCC's jurisdiction to implement the Act, arguing that much of the authority to enforce the provisions (§§ 251 and 252) remain with the state commissions by virtue of § 2(b). Specifically, they contended that the Act gives the FCC

jurisdiction over intrastate matters only when the statute explicitly applies to intrastate services and specifically confers agency jurisdiction over intrastate services.

The Court brushed aside these attempts to raise the § 2(b) jurisdictional fence and squarely held that " § 201(b) [FN42] explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." Iowa Utilities, 119 S.Ct. at 730. Though § 2(b)'s language stating that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction" implies that FCC jurisdiction does not always follow where the Act applies, the Court held that "the term 'apply' limits the substantive reach of the statute ... and the phrase 'or Commission jurisdiction' limits ... the FCC's ancillary jurisdiction." Id. at 731. Relying on this holding, the FCC argues that because § 254 applies to intrastate as well as interstate matters, § 201(b) confers the necessary jurisdiction to implement the "no disconnect" rule.

> FN42. "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b).

[27] Though the Court's broad language seems to support the FCC's position, Bell Atlantic finds comfort in the Court's preservation of Louisiana PSC. In reconciling its holding with Louisiana PSC, the Court held that the FCC must show that the meaning of a statutory provision applies to intrastate matters in an "unambiguous and straightforward" manner as "to override the command of § 2(b)." Iowa Utilities, 119 S.Ct. at 731 (quoting Louisiana PSC, 476 U.S. at 377, 106 S.Ct. 1890). If the agency fails in this initial task, it cannot use its normally broad regulatory authority to assert what is now only ancillary jurisdiction because of the still-intact

jurisdictional fence created by § 2(b). See id. Therefore, after Iowa Utilities, § 2(b) still serves as (1) a rule of statutory construction [FN43] requiring the FCC to find unambiguous statutory authority applying to intrastate matters and (2) a jurisdictionalbarrier restricting the agency from using its plenary authority to assert ancillary jurisdiction by "taking intrastate action solely because it further[s] an interstate goal." See Iowa Utilities, 119 S.Ct. at 731 (citing Louisiana PSC, 476 U.S. at 374, 106 S.Ct. 1890).

> FN43. Accord Louisiana PSC, 476 U.S. at 376 n. 5, 106 S.Ct. 1890 ("[Section] 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction.")

The question is whether § 254 does indeed "apply" to intrastate matters in a sufficiently "unambiguous" manner. Without such a finding, Iowa Utilities flatly holds that the FCC cannot use its plenary authority to assert ancillary jurisdiction.

Unfortunately, Iowa Utilities provides little guidance for resolving the question whether § 254 applies to intrastate services. For the Supreme Court, "the question ... is not whether the Federal Government ***424** has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." Iowa Utilities, 119 S.Ct. at 730 n. 6. The Court did not further explain why it felt §§ 251 and 252 "unquestionably" applied to intrastate matters.

The FCC bases its contention that § 254 plainly applies to

intrastate as well as interstate matters on § 254(b)(3),(c), and (j). According to the agency, § 254(b)(3) applies to intrastate service by stating that "low income consumers ... should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services."

The use of the word "including," the FCC argues, indicates that the object of § 254 is to provide access to more than just interexchange services. Furthermore, § 254(c) instructs the agency to consider, in the process of establishing what constitutes universal service, whether such services "have ... been subscribed to by a substantial majority of residential customers." Finally, § 254(j) specifically preserves the Lifeline Assistance program, which has always provided subsidies for both intrastate and interstate services.

We have already discussed our reluctance to rely on the aspirational language of § 254(b). [FN44] Moreover, the phrase "including interexchange carriers" cannot be said unambiguously to mean that § 254 applies to local services, and § 254(c)'s mention of a "majority of residential customers" is far from straightforward. Neither is there much guidance from § 254(j), which specifically protects the Lifeline Assistance program from being affected by any other part of § 254 but does not in any way clarify to what degree § 254 applies to intrastate universal service.

FN44. See supra part III.A.3.

Instead, there is substantial support in the statute for a dual regulatory structure in the administration of the universal service program. Section 254(d) specifically instructs interstate carriers to contribute to the FCC's universal service mechanisms, while § 254(f) instructs intrastate carriers to

contribute to the states' individual universal service mechanisms. This section contains the only discussion of intrastate universal service mechanisms and directs intrastate carriers to report to the states rather than to the FCC.

In light of Iowa Utilities and Louisiana PSC, therefore, we conclude that, "while it is, no doubt, possible to find some support in the broad language of the section for [the FCC's] position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b)." Louisiana PSC, 476 U.S. at 377, 106 S.Ct. 1890. Unlike §§ 251 and 252, which were solely concerned with intrastate issues (i.e., interconnection of new entrants into the local telephone market), § 254 applies to both interstate and intrastate services. It does so, however, only to the extent that it gives exclusive authority over intrastate contributions to the state commissions. We find it incongruous to use this explicit limitation on FCC authority as the hook to provide it with jurisdiction.

Therefore, the FCC exceeded its jurisdiction when it imposed the "no disconnect" rule. Because there is no express grant of statutory authority, a proper showing of "impossibility," or a persuasive explanation of how § 254 applies to intrastate service, we reverse, for want of agency jurisdiction, those portions of the Order implementing the "no disconnect" rule.

4. RECOVERY OF UNIVERSAL SERVICE CONTRIBUTIONS.

a. REQUIRING INCUMBENTS TO RECOVER CONTRIBUTIONS THROUGH ACCESS CHARGES.

[28] GTE and the FCC again wrangle over the meaning of "explicit" in their ***425** dispute regarding the rule requiring

most ILEC's to recover their universal service contributions through access charges. GTE contends that the rule violates § 254(e)'s command that any support for universal service be "explicit," because recovering contributions through increased access charges is a form of implicit subsidy.

GTE argues that the rule unfairly disadvantages ILEC's because, unlike their potential new competitors, they cannot recover their universal service contributions through explicit charges on their end-users, but, instead, are required by the FCC to increase their access charges on long-distance service providers. Though they do not necessarily lose out in terms of amounts recovered, GTE fears that this recovery method will put them at a competitive disadvantage because, instead of than seeing the costs of universal service on his bill as an explicit surcharge, an ILEC consumer will pay for the costs of universal service through higher rates.

The FCC advances a different understanding of "explicit." "Regardless of how carriers recover their contributions, the FCC's universal service system 'satisfies the statutory requirement that support be explicit' by requiring each carrier to contribute a specific percentage of its end user revenues" (quoting Order ¶ 854). As long as carriers know exactly how much they are contributing to the support mechanisms, the subsidies are explicit.

The statute provides little guidance on whether "explicit" means "explicit to the consumer" (as urged by GTE) or "explicit to the carrier" (as urged by the FCC). The statute does state, how ever, that all universal service support should be "explicit." We read "explicit" to mean the opposite of "implicit." See § 254(e).

By forcing GTE to recover its universal service contributions

from its access charges, the FCC's interpretation maintains an implicit subsidy for ILEC's such as GTE. In fact, requiring carriers to recover their contributions from access charges on interstate calls shifts the costs of intrastate universal service to the interstate jurisdiction. These are precisely the sorts of implicit subsidies currently used by the FCC in its DAM weighting program. See Order ¶ 212 (discussing rules that permit small LEC's to recover costs for intrastate services from interstate access charges).

We are convinced that the plain language of § 254(e) does not permit the FCC to maintain any implicit subsidies for universal service support. Therefore, we will not afford the FCC any Chevron step-two deference in light of this unambiguous Congressional intent. Because the agency continues to require implicit subsidies for ILEC's in violation of a plain, direct statutory command, we reverse its decision to require ILEC's to recover universal service contributions from their interstate access charges.

b. REQUIRING INTERSTATE CARRIERS TO REDUCE INTERSTATE ACCESS CHARGES BY THE AMOUNT OF FEDERAL HIGH-COST SUPPORT THEY RECEIVE UNDER THE NEW UNIVERSAL SERVICE SYSTEM.

[29] The states contest an aspect of the Order's effect on interstate access charges, arguing that the requirement that carriers reduce their interstate access charges by the amount of direct federal high-cost support they receive will leave insufficient funds for intrastate universal service. The states make two unconvincing plain-language arguments. First, they point to § 254(b)(5)'s language about "specific, predictable and sufficient" mechanisms to "preserve and advance universal service." As we have observed, § 254(b)

identifies a set of principles and does not lay out any specific commands for the FCC. Even § 254(e), which is framed as a direct, statutory command, is ambiguous as to what constitutes "sufficient" support. Therefore, we do not consider the language an expression of Congress's "unambiguous intent" allowing Chevron step-one ***426** review, and we review its interpretation for reasonability under Chevron step-two.

The states argue that § 254(e) does not permit the application of federal universal service funds for the interstate jurisdiction. In essence, they seek to preserve state universal service support by reading the statute to require all high-cost support to remain intrastate. Though this might make compelling policy, nothing in the plain language of § 254(e) [FN45] unequivocally establishes the states' right to all of the federal universal support funds. The statutory language is at best ambiguous as to Congress's intent, which, under Chevron step-two, leaves it to the FCC's reasonable interpretation.

> FN45. "A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."

The FCC has offered good reason to believe that its new explicit support through direct subsidies will replace the amounts lost through the reduction of access charges. See Report to Congress ¶ 230. To be sure, the states and intervenor NASUCA [FN46] make a plausible argument that ILEC's will receive less under the new plan than they did through implicit subsidies. As we have determined, however, because the FCC has offered reasonable

explanations of why it thinks the funds will still be "sufficient" to support high-cost areas, we defer to the agency's judgment of what is "sufficient."

> FN46. National Association of State Utility Consumer Advocates.

Under the agency's new universal service plan, it is possible that the states will receive less support for intrastate universal service costs than they did under the old plan. While this may seem unfair as a matter of policy, the states have failed to show that the FCC's interpretation, which may possibly result in a reduction of their level of support, is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844, 104 S.Ct. 2778.

5. CONTRIBUTIONS.
a. REQUIRING CMRS CARRIERS TO CONTRIBUTE TO THE FEDERAL UNIVERSAL SERVICE FUND. [FN47]

> FN47. Intervenor American Cable Television Association challenges the FCC for failing to meet the requirements of the Regulatory Flexibility Act before promulgating the Order. None of the petitioners raises this argument, nor does the FCC respond to it, and therefore we do not consider it. See discussion of MCI's intervenor argument, infra part III.A.6.b.

Celpage Inc., a paging carrier, and intervenors representing a number of wireless telecommunications companies (referred to in general as commercial mobile radio service or "CMRS" providers), challenge the FCC's decision to subject them to the universal service support scheme. Celpage raises a number of constitutional and statutory challenges to the

decision to require their contributions to the universal service fund. Specifically, Celpage attacks the agency's universal service contribution requirement as an unconstitutional tax, a violation of equal protection, and an uncompensated taking. Additionally, Celpage charges that the FCC's action violates § 254's plain language, is arbitrary and capricious, and does not meet the agency's own principle of competitive neutrality.

i. CONSTITUTIONAL CHALLENGES.
(a). UNCONSTITUTIONAL TAX.

There are two ways in which the universal service contribution requirement for paging carriers could constitute an unconstitutional tax. First, the FCC's application of the universal service requirement to paging carriers such as Celpage might be an unconstitutional delegation of Congress's exclusive taxing power under the Taxing Clause. [FN48] Alternatively, because ***427** the Act originated in the Senate, [FN49] its requirement of universal service contributions from paging carriers might violate the Origination Clause's requirement that all "[b]ills for raising [r]evenue originate in the House of Representatives" [FN50]

> FN48. U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes....").
>
> FN49. See Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (enacting S. 652).
>
> FN50. U.S. CONST., art. I, § 7, cl. 1 ("All Bills for Raising Revenue shall originate in the House of Representatives.")

[30][31] Despite their similarities, the Taxing Clause and

Origination Clause challenges to the universal service contribution system represent separate lines of analysis. [FN51] In its initial brief, however, Celpage raises only the Origination Clause challenge and does not raise a Taxing Clause claim until its reply brief. Therefore, we will not consider it, [FN52] and we focus our efforts on Celpage's claim that the universal service contribution requirement, as applied to paging carriers, is a violation of the Origination Clause. [FN53]

FN51. The Taxing Clause analysis focuses on whether the assessment is a tax or a fee. This question is usually resolved based on whether the revenues are used to primarily defray the expenses of regulating the act. See National Cable Television Ass'n v. United States, 415 U.S. 336, 340, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974). If it is a tax, then courts will ask whether it has been properly delegated. Id. On the other hand, the Origination Clause analysis asks whether (1) the revenues generated from the assessment are for general revenues or for a particular program and (2) there is a connection between the payors and the beneficiaries of the program. See Munoz-Flores, 495 U.S. at 397, 110 S.Ct. 1964. See infra part III.B.1.c. n.83.

FN52. Generally, we do not consider arguments raised for the first time in a reply brief. See Fed. R.App. P. 28(c). Even if Celpage's Taxing Clause argument were properly before us, we find no basis for reversal. As applied to paging carriers, the universal service contribution qualifies as a fee because it is a payment in support of a service (managing and regulating the public telecommunications network) that confers special

benefits on the payees. See National Cable, 415 U.S. at 340, 94 S.Ct. 1146. Cf. Rural Tele. Coalition v. FCC, 838 F.2d 1307, 1314 (D.C.Cir.1988) (upholding universal service contributions as a fee supporting allocations between interstate and intrastate jurisdictions).

FN53. The Supreme Court has squarely held that Origination Clause challenges are subject to judicial review and do not fall under the political question doctrine. "A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would a law passed in violation of the First Amendment." Munoz-Flores, 495 U.S. at 397, 110 S.Ct. 1964.

[32] Unfortunately for Celpage, its Origination Clause claim cannot survive United States v. Munoz-Flores, 495 U.S. 385, 398, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990). There, the Court refused to find that a special assessment on certain federal criminals for a "crime victim's" fund is a tax, because "a statute that creates a particular governmental program and that raises revenue to support that program ... is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." Id.

Celpage points out that the Congressional Budget Office has treated universal service fund contributions as federal revenues. But how the government classifies a program for accounting purposes does not resolve whether the funds are used for a specific program or for general revenues. Indeed, the Court in Munoz-Flores upheld the special assessment even though the excess money collected was deposited in the Treasury. Instead of looking at accounting designations,

Munoz-Flores teaches us (1) to determine whether the funds are "part of a particular program to provide money for that program ...." and (2) to establish a connection between the payors and the beneficiaries. Munoz-Flores, 495 U.S. at 399, 400 n. 7, 110 S.Ct. 1964.

With one exception, [FN54] universal service contributions are part of a particular program ***428** supporting the expansion of, and increased access to, the public institutional telecommunications network. See Order ¶ 8. Each paging carrier directly benefits from a larger and larger network and, with that in mind, Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service. [FN55] This design prevents the sums being used to support the universal service program from being classified as "revenue" within the meaning of the Origination Clause.

> FN54. See discussion of § 254(h) support for internet services, infra part III.B.1. Unlike the circumstance in that case, the situation here is that of a telecommunications service provider's (a paging carrier's) being required to support the maintenance of a large telecommunications network.

> FN55. See § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute ... to the ... mechanisms established by the Commission to preserve and advance universal service."); § 254(f) ("Every telecommunications carrier that provides intrastate telecommunications services shall contribute....").

Paging carriers are uniquely dependent on a widespread telecommunications network for the maintenance and

expansion of their business. See Order ¶ 82. As in Munoz-Flores, the challenged assessment targets a group "to which some part of the expenses" of sustaining the universal service program "can fairly be attributed." See Munoz-Flores, 495 U.S. at 400 n. 7, 110 S.Ct. 1964. Therefore, the application of the universal service contribution requirement to paging carriers does not transform the Act into a "bill for raising revenue" in violation of the Origination Clause. [FN56]

FN56. The Munoz-Flores Court does not discuss in great detail the importance, in Origination Clause analysis, of some kind of relationship between the payors and the beneficiaries. Still, it makes sense that the Court would insist on some link, because an assessment on one group for the benefit of a completely unrelated group is how courts have distinguished taxes raised for general federal outlays from fees raised for specific programs. Otherwise, Congress could always avoid the Origination Clause requirement because, in theory, all revenue is raised to fund some "particular program." Thus, courts must establish some relationship between the payors and the beneficiaries to avoid the strictures of the Origination Clause.

(b). EQUAL PROTECTION.

[33] To invalidate the FCC's actions on equal protection grounds, we must find that there is no "basis for the action that bears a debatably rational relationship to a conceivable legitimate govern mental end." See Reid v. Rolling Fork Pub. Util. Dist., 979 F.2d 1084, 1087 (5th Cir.1992). This is a tough burden, and Celpage does not come close. Celpage argues there can be no rational reason to include paging carriers in the universal service contribution system, because

its contributions will support services that do not benefit Celpage. But the FCC has offered a reasonable proposition: Paging carriers such as Celpage benefit from a larger and more universal public network system, because it increases the number of potential locations for paging use. Even if this proposition is wrong, as Celpage suggests, it certainly meets the very low "debatably rational" test. [FN57]

> FN57. See Reid, 979 F.2d at 1087 (5th Cir.1992) (stating that a "decision of a governmental body does not violate equal protection guarantees if there is any basis for the action that bears a debatably rational relationship to a conceivable legitimate governmental end").

(c). TAKING.

[34][35] Celpage advances an unconvincing takings claim. As an initial matter, a takings claim is not ripe until a claimant has unsuccessfully sought compensation from the state. [FN58] Celpage does not allege that it has used any of the FCC's administrative procedures to petition for compensation or that such procedures are so inadequate as to make resort to these procedures futile. "To violate the [takings] clause, the state must not only take someone's property but also deny him ***429** compensation." Samaad v. City of Dallas, 940 F.2d 925, 934 (5th Cir.1991).

> FN58. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

As we did in the case of GTE's challenge to the forward-looking cost methodology, we reject Celpage's takings claim as not ripe for judicial review. [FN59]

FN59. Even if we considered Celpage's takings claim, it would fail to demonstrate how its claim comports with the three factors the Supreme Court has established to analyze a regulatory takings claim: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986). In particular, Celpage has failed to offer reasonably specific predictions of the size and scale of this taking, thereby failing to show the extent to which the regulation has interfered with its distinct investment-backed expectations.

ii. OTHER CHALLENGES.

[36] Celpage attacks the FCC's interpretation of the "equitable and nondiscriminatory" language in § 254(b)(4). To be truly equitable, Celpage asserts, the agency should not treat all carriers in the same way for purposes of the universal service contribution system. Additionally, Celpage accuses the agency of failing to consider evidence of congressional intent, the record evidence, and other evidence of why paging carriers should not be included in the universal service contribution system.

The FCC has successfully dispensed with the plain language challenge. First, as we have explained, the "equitable and nondiscriminatory" language in § 254(b) acts as only one of seven guiding principles for FCC rulemaking. See supra part III.A.1.a.i. That subsection also instructs the agency that "all providers of telecommunications services should make an

equitable and nondiscriminatory contribution" to universal service. (Emphasis added.) The language of § 254(b) directs us to give the FCC, in addition to the usual Chevron deference, discretion here to fashion a policy that is guided by both of these principles.

[37] Celpage also challenges the FCC's interpretation as arbitrary and capricious under the APA because it is not supported by the record, and the agency has provided no reason why its decision should be made in the face of contrary record evidence. Specifically, Celpage says that the FCC failed to consider ex parte statements by legislators during the rulemaking proceedings urging it to exclude CMRS carriers from the universal service contribution system. Additionally, Celpage points to evidence in the record supporting its position and claims the FCC failed to consider it.

[38] To achieve reversal under the APA's arbitrary and capricious standard, Celpage must show that the FCC failed to "articulate[ ] a rational relationship between the facts found and the choice made...." Harris, 19 F.3d at 1096. A reviewing court tries "to determine whether the decision was based on a consideration of relevant factors...." Louisiana v. Verity, 853 F.2d 322, 327 (5th Cir.1988).

The record does not show that the FCC failed to consider the counter-arguments proffered by the CMRS providers and their allies. The agency did take note of letters from Congress on behalf of CMRS providers and from other legislators taking the opposite position. See Report to Congress ¶ 129 & n.301. Moreover, the letters on both sides have limited persuasiveness, because they are simply "post-passage remarks" that " 'represent only the personal views of these legislators' " and "cannot serve to the change the

legislative intent of Congress expressed before the Act's passage." Regional Rail Reorganization Act Cases, 419 U.S. 102, 132, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (quoting National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639 n. 34, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967)).

[39][40] The FCC offered a reasonable justification for including CMRS providers--***430** this time relying on statutory language, the Joint Board recommendation, and the reasonable view that paging carriers do receive benefits from the universal service system. Accordingly, the agency's interpretation may not fairly be described as "arbitrary and capricious" under the APA. [FN60]

> FN60. Celpage also challenges the FCC's ruling for violating its own principle of "competitive neutrality." Because this term has been developed by the FCC through regulation rather than through interpretation of the statute, we should give the agency broad deference in applying this principle, and we can reverse only if we find the FCC's actions "arbitrary, capricious or manifestly contrary to the statute." Chevron, 467 U.S. at 844, 104 S.Ct. 2778. The FCC's decision to require paging operators to contribute to the support of a network through which their business operates is not so irrational or arbitrary as to merit reversal.

iii. IMPLEMENTING UNIVERSAL SERVICE ASSESSMENT REQUIREMENTS.

[41] Celpage and the CMRS Providers challenge the FCC's rules and procedures for assessing contributions in the form of the Universal Service Worksheet. Specifically, Celpage attacks the worksheet for failing to distinguish between billed

revenues and collected revenues for purposes of calculating universal service contributions. The CMRS Providers complain that the FCC's failure to provide guidance on how to adjust for the different nature of CMRS revenues makes the assessment system unconstitutionally vague.

We do not reach the vagueness argument, because the FCC persuasively responds that these challenges are not yet ripe for judicial review, for the reason that the agency has made a "tentative decision." [FN61] Similar attacks on the Worksheet are currently pending before the agency as petitions for reconsideration. [FN62] Moreover, recognizing the difficulties that the Worksheet raises, the FCC has already granted CMRS providers interim relief by allowing them to provide good-faith estimates of the figures required by the Worksheet.

FN61. See Pub. Citizen Health Research v. Commissioner, Food & Drug Admin., 740 F.2d 21 (D.C.Cir.1984) (refusing to exercise judicial review over tentative agency actions absent excessive delay or extraordinary recalcitrance).

FN62. On October 26, 1998, the FCC released an order and a further notice of proposed rulemaking on the question of how to assess wireless carriers' revenues. The agency made a tentative decision to provide wireless carriers with interim guidelines for how to approximate their percentage of interstate wireless revenues. Additionally, the agency sought comment on various proposals for a final guideline on such calculations and comment on the relationship of wireless communications providers to universal

> service. This order further supports the FCC's position that it has not yet made a final decision on how to handle these issues.

Thus, the agency properly asks us to defer judicial review of its tentative decision until all administrative remedies are exhausted. In analogous situations, courts have postponed review "until relevant agency proceedings have been concluded [to] permit[ ] an administrative agency to develop a factual record, to apply its expertise to the record, and to avoid piecemeal appeals." See Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C.Cir.1984) (internal citations omitted).

iv. STATES' COLLECTION OF UNIVERSAL SERVICE ASSESSMENT FROM CMRS CARRIERS.

Celpage and the CMRS Providers make a convincing challenge in contesting the FCC's decision to permit states to impose universal service contribution requirements on CMRS providers. They argue that the plain language of 47 U.S.C. § 332(c)(3)(A) specifically preempts states from doing so. Additionally, the CMRS Providers contend that § 254(f)'s language, relied on by the FCC, does not reach CMRS providers, because they are interstate carriers.

***431** (a) Plain Language of § 332(c)(3)(A).

Celpage and the CMRS Providers argue that in § 332(c)(3)(A), "Congress has spoken to the precise question at issue," the ability of states to assess CMRS providers for universal service contributions. See Chevron, 467 U.S. at 842, 104 S.Ct. 2778. Therefore, they argue that the FCC's interpretation deserves no deference. The plain language of § 332(c)(3)(A) does seem to apply to the issue at hand:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

[42] Before we discuss the differing interpretations of the statute, we must decide on the proper standard of review. The Tenth Circuit recently reviewed the FCC's interpretation of this section under the second step of Chevron, because the statute does not expressly state how we should read § 332(c)(3)(A) in relation to § 254(f). See Sprint Spectrum v. State Corp. Com'n of Kansas, 149 F.3d 1058, 1061 (10th Cir.1998). This standard of review is inappropriate, however, because it would allow the FCC to receive Chevron deference in almost every situation in which two sections of a statute must be read together. Indeed, the Act does contain a specific rule of statutory construction in § 601(c)(1), reprinted in 47 U.S.C. § 152 (Addendum A-1): "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly provided in such Act or Amendments."

Thus, we disagree with the Sprint court that the lack of a specific provision discussing the relation between §§ 332(c)(3)(A) and 254(f) automatically triggers Chevron

deference. To the contrary, § 601(c)(1) gives us explicit instruction to read § 254(f) ("federal law") as not conflicting with § 332(c)(3)(A). Therefore, we conduct a Chevron step-one review and try to search out the statute's plain meaning.

[43] Celpage and the CMRS Providers offer this "plain common sense" reading: Assessments for universal service by state commissions constitute regulation of rates or entry for purposes of the statute. The first sentence of this subsection prohibits the states from regulating rates or entry, and therefore prohibits universal service assessments, relating to CMRS providers. The second sentence explains that states may impose universal service requirements "where such services are a substitute for land line telephone exchange service...." This plain language, Celpage and the CMRS Providers argue, expressly prohibits states from requiring universal service contributions from CMRS providers without first making a finding that the CMRS services in question are a substitute for landline telephone service.

The FCC points to plain language that requires it to make "[e]very ... carrier that provides intrastate telecommunications service" contribute to the universal service programs as determined by the states. See 47 U.S.C. § 254(f). It then contends that the provisions of § 332(c)(3)(A) should not be read to trump the express commands of § 254(f).

The FCC finds support for its reading in the second clause of the first sentence of § 332(c)(3)(A). First, it concludes that requiring universal service contributions is neither rate nor entry regulation. See ***432** Fourth Reconsideration Order ¶ 301. It then notes that this clause says that a state is not prohibited from regulating "other terms and conditions of commercial mobile services." Based on this clause alone, the FCC argues, the states retain the ability to compel

universal service contributions as long as it does not constitute regulation of rates or entry. The second sentence simply clarifies that states can also regulate "rates and entry" if they make a finding that CMRS providers are substituting for landline service.

The Sprint court adopted this reading of § 332(c)(3)(A) and added another argument for the FCC's position. See Sprint, 149 F.3d at 1061. The second sentence's introductory language, "nothing in this subparagraph ...," limits the reach of the landline substitution requirement to § 332(c)(3)(A). Therefore, the landline substitution requirement "simply is not relevant to § 254(f)." Id.

The petitioners argue that the FCC's reading violates the maxim of statutory construction that all language of a statute must be given effect. [FN63] According to the petitioners, if we read the clause "other terms and conditions" to enable states to impose universal service requirements, then the entire second sentence would be redundant. There would be no reason to create a statutory requirement for when states may impose conditions for universal service if the "other terms and conditions" clause already allows states to impose universal service requirements on CMRS providers.

> FN63. See Mississippi Poultry Ass'n v. Madigan, 31 F.3d 293, 304 (5th Cir.1994) (en banc) ("[A] statute should be interpreted so as not to render one part inoperative.").

But the FCC persuasively responds that, under its reading, the second sentence clarifies the ability of states to regulate rates and entry in the name of universal service, while the "other terms and conditions" clause opens the door to all other universal service regulation. Thus, we do not

conclude, as the petitioners imply we should, that requiring universal service contributions necessarily constitutes the regulation of rates and entry. [FN64] Thus, under the FCC's reading, the states may generally regulate CMRS providers as they please, but they may regulate the rates and entry of CMRS providers only when they make a finding of substitutability.

> FN64. A state commission could require a universal service contribution based on end-user revenues but leave the carrier free to set its rates as it pleases while not blocking new carriers from entering the market. On the other hand, a state commission would be regulating "rates and entry" if it required the carriers to lower rates for one group of customers as part of an implicit subsidy.

We disagree with the CMRS Providers' further argument that even this reading, adopted in Cellular Telecomms. Indus. Ass'n v. FCC, 168 F.3d 1332 (D.C.Cir.1999), [FN65] would render the second sentence redundant because the third sentence of the subsection specifically lays out the procedures under which a state can petition for the right to regulate CMRS rates. The FCC's reading would still permit the following understanding of the statute: States (1) in general can never regulate rates and entry requirements for CMRS providers; (2) are free to regulate all other terms and conditions of CMRS service; (3) may regulate CMRS rates and entry requirements when they have made a substitutability finding in connection with universal service programs; and (4) may also regulate CMRS rates if they petition the FCC and meet certain statutory requirements, including either substitutability or unjust market rates. None of the provisions would have to be read as inoperative or redundant.

FN65. See also Sprint Spectrum, L.P. v. State Corp. Comm'n, 966 F.Supp. 1043 (D.Kan.1997).

Additionally, this reading would avoid conflict with § 254(f), which requires that "every telecommunications carrier" contribute to the universal service fund. This ***433** rendition of § 332(c)(3)(A) allows the FCC to give effect to the plain language of § 254(f) while not violating § 601(c)'s directive to construe the Act in ways that do not "modify, impair, or supersede" federal law.

Therefore, the reading offered by Celpage and the CMRS Providers does not represent the unambiguous intent of Congress. The FCC's reading reflects Congress's unambiguous intent as expressed in the plain language of the statute and takes into account Congress's instruction that § 254 be construed in ways that do not conflict with other federal laws. [FN66] Therefore, we reject Celpage and the CMRS providers' challenges to this section of the Order.

FN66. Even if the CMRS providers are right that the plain language does not unambiguously support the FCC's reading, we would defer to the FCC's reasonable interpretation under Chevron step-two. Accord Cellular Telecommunications, 168 F.3d at 1336 ("The bottom line is that Cellular has not demonstrated that its interpretation of § 332(c)(3)(A) is the only permissible one....").

(b) CMRS PROVIDERS AS INTERSTATE CARRIERS.

[44] Celpage and the CMRS Providers raise a weak challenge to state contribution requirements, contending that CMRS providers are "jurisdictionally interstate" and therefore exempt from state assessments. We agree with the FCC that

the plain language of § 254(f) simply requires that "[e]very telecommunications carrier that provides intrastate telecommunications services" contribute to state mechanisms. As the agency found, a significant portion of the CMRS providers' services arise from providing intrastate telecommunications services. [FN67] This undeniably significant involvement of CMRS providers in the provision of intrastate service is more than sufficient to place them within the ambit of § 254(f).

> FN67. According to one study, interstate revenues accounted for only 5.6% of total revenues for cellular and personal communications service carriers and 24% of total revenues for paging and other mobile service carriers. See Fourth Reconsideration Order ¶ 303.

b. DETERMINING THAT INTERSTATE CARRIERS MUST CONTRIBUTE ON THE BASIS OF THEIR INTERNATIONAL REVENUES.

COMSAT, a small interstate carrier specializing in providing international telephone service, challenges the FCC's decision to define the universal service base to include the international revenues of interstate carriers. COMSAT derives such a small portion of its revenues from interstate service that it would end up with universal payment obligations exceeding its interstate revenues. It argues that this bizarre outcome violates § 254(d)' s requirement that all universal service contributions be "equitable and nondiscriminatory" and the FCC's own principle of competitive neutrality. At the very least, COMSAT argues, this result shows that the FCC's action is arbitrary and capricious.

[45] As a threshold matter, the FCC challenges the availability of judicial review, because COMSAT failed to petition the agency for reconsideration, as required by § 405 of the Act. [FN68] COMSAT responds that the absence of a § 405 petition for rehearing is not a bar to judicial review if the petitioner was a party in the rulemaking proceeding and the FCC was afforded an opportunity to rule on the issue. [FN69] Because COMSAT did participate in the rulemaking proceeding and did file comments [*434 FN70] with the agency on this question, we agree that § 405 does not bar our review. [FN71]

FN68. 47 U.S.C. § 405(a).

FN69. "The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass." 47 U.S.C. § 405(a).

FN70. See generally Comments of COMSAT Corp., CC Docket No. 96-45 (filed Dec. 19, 1996); Comments of COMSAT Corp., CC Docket No. 96-45 (filed April 12, 1996).

FN71. See Time Warner Entertainment Co., L.P. v. FCC, 144 F.3d 75, 80 (D.C.Cir.1998) ("So long as the issue is necessarily implicated by the argument made to the Commission, section 405 does not bar our review.").

[46] The FCC is more persuasive when it argues that COMSAT is really asking for consideration of its individual circumstance rather than challenging the rule as a whole. In this situation, the FCC argues that waiver is a more appropriate remedy than is judicial review. In fact, COMSAT did file a petition for waiver but withdrew it without explanation shortly before the FCC filed its brief in this case. COMSAT now claims to be bringing this claim on behalf of all international carriers in similar circumstances, but it fails to identify any such entities and remains alone in its petition for review.

While waiver may be an appropriate remedy, the FCC cites no authority for the proposition that consideration of a waiver is required before judicial review may occur, and our research has found no such authority. The case relied on by the FCC stands only for the proposition that waiver will be allowed as long as the underlying rule is rational. [FN72] We see no statutory basis for denying judicial review on the ground that a party must first seek a waiver. Therefore, we consider the rule on its merits.

> FN72. See National Rural Telecomm. Ass'n v. FCC, 988 F.2d 174, 181 (D.C.Cir.1993).

[47] COMSAT's attack boils down to the argument that it is being unfairly treated because it will be forced to pay more in universal service contributions than it can generate in interstate revenues. [FN73] It makes a compelling argument that this result alone violates the equitable language of the statute. The FCC's response to the statutory challenge simply states that there is nothing "inequitable" about requiring a carrier benefiting from universal service from contributing to it.

FN73. COMSAT estimates that the application of the FCC's interpretation would require it to contribute more in universal service fees ($5 million) than it would generate in interstate revenues ($3.8 million).

Under this reading, however, it is difficult to know what the FCC would consider inequitable, because any carrier could conceivably benefit from universal service. Obviously, the language also refers to the fairness in the allocation of contribution duties. In this matter, COMSAT can show that it is being forced to pay more under this rule than it can generate in revenues, yet the FCC does not find even this situation "inequitable."

Moreover, the FCC dismisses COMSAT's claim that the agency violates the "nondiscriminatory" requirement of § 254(d) simply by saying that the agency has recognized that some providers of international service will be treated differently from others. But this recognition of discrimination hardly saves the agency from the statutory requirement that contributions are collected on a non-discriminatory basis.

The agency falls back on its discretion, under the statute, to balance the competing concerns set forth in § 254(b), which include the need for sufficient revenues to support universal service. While the statute allows the FCC a considerable amount of discretion, however, that discretion is not absolute. The heavy inequity the rule places on COMSAT and similarly situated carriers cannot simply be dismissed by the agency as a consequence of its administrative discretion.

Therefore, the agency's interpretation of "equitable and nondiscriminatory," allowing it to impose prohibitive costs on carriers such as COMSAT, is "arbitrary and capricious and

manifestly contrary to the *435 statute." Chevron, 467 U.S. at 844, 104 S.Ct. 2778. COMSAT and carriers like it will contribute more in universal service payments than they will generate from interstate service. [FN74] Additionally, the FCC's interpretation is "discriminatory," because the agency concedes that its rule damages some international carriers like COMSAT more than it harms others. The agency has offered no reasonable explanation of how this outcome, which will require companies such as COMSAT to incur a loss to participate in interstate service, satisfies the statute's "equitable and nondiscriminatory" language. We therefore reverse and remand this portion of the Order for further consideration.

> FN74. COMSAT also points out that much of the interstate service it provides is at the request of the government, to ensure service to isolated locations such as Guam and American Samoa.

6. TIMING.

a. TIMETABLE FOR THE IMPLEMENTATION OF AN EXPLICIT SYSTEM OF UNIVERSAL SERVICE SUPPORT .

[48][49] On statutory and constitutional grounds, GTE attacks the FCC's timetable for implementation of an explicit system of universal service support. [FN75] First, GTE argues that the agency's decision to wait until January 1, 2000, before implementing its plan for providing explicit support for universal service violates the statutory requirements of § 254. Second, GTE asserts that the delay in implementation results in an unconstitutional taking.

> FN75. The FCC asks us to bar review of this question, arguing that GTE and SBC are collaterally estopped

from litigating it because they did so during challenges to the Access Charge Order in the Eighth Circuit. See Southwestern Bell, 153 F.3d at 537. Before applying collateral estoppel, we must first decide whether (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine. See Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 391 (5th Cir.1998), cert. denied, ---- U.S. ----, 119 S.Ct. 1286, 143 L.Ed.2d 378 (1999). We agree with the petitioners that the challenge to the FCC's high-cost support timetable is not "identical," for collateral estoppel purposes, to the issue raised in that case. Although the petitioners challenge the coordination between implicit subsidies in the access charge system and those in the new support system, their challenge in this case involves a broader attack on the timing of the entire universal service high-cost support system rather than on just its interactions with the access charge system.

The Eighth Circuit did not consider the contention that GTE brings before us: that the FCC violated § 254(a) by failing to implement an "explicit" and "sufficient" universal service support system within "fifteen months" of the 1996 Act's enactment. The Eighth Circuit relied on the fact that the deadline for adopting rules on universal service came after the date for adopting rules on opening the market to local competition. See Southwestern Bell, 153 F.3d at 537. Therefore, there was no need for that court to

> decide whether § 254(a) requires full implementation within "fifteen months" of the enactment, and GTE is not collaterally estopped for pursuing its appeal of § 254(a) in this court. See Winters, 149 F.3d at 391 n. 3 ("[U]nless prior issue sought to be precluded from relitigation was a 'critical or necessary part' integral to the prior judgment, collateral estoppel may not apply.").

i. STATUTORY LANGUAGE.

[50] GTE contends that the delay in implementation violates § 254(e) because it fails to provide "sufficient" funding to support universal service. [FN76] In fact, between the Order's release on May 8, 1997, and its implementation on January 1, 2000, the FCC will have provided no explicit support to the ILEC's, while it has already exposed them to outside competition. In theory, then, new entrants could begin "cherry-picking" the ILEC's' best low-***436** cost, high-profit customers, leaving the ILEC's stuck with the high-cost, money-losing customers that are supposed to be supported by the new universal service subsidy system. This would erode the old implicit subsidy system before the FCC had implemented the new explicit subsidy system.

> FN76. GTE also claims that the FCC's actions violate the "predictable" and "nondiscriminatory" requirements of § 254(b). We see no merit to this contention and focus instead on GTE's best statutory argument, which relies on the use of the term "sufficient" in § 254(e).

The question is whether the statute's language plainly requires the FCC to have implemented explicit subsidies at

the same time that it issued the Order on May 8, 1997. GTE claims the statute requires immediate implementation. But the plain language of § 254(a)(2) requires us to reach the opposite result:

> The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation.

47 U.S.C. § 254(a)(2)(emphasis added).

By instructing the FCC to establish a "timetable for implementation" by the statutory deadline, Congress assumed the implementation process would occur over a transition period after the fifteen-month deadline. There is no reason to believe--and GTE does not offer a reason--that the instruction to establish a timetable actually means immediate implementation of the explicit subsidy system at the statutory deadline. [FN77]

> FN77. Section 254(e) contemplates that universal support will be "explicit" and "sufficient" "[a]fter the date on which Commission regulations implementing this section [§ 254(e)] take effect." This language further supports the FCC's reading that Congress did not require implementation of the high-cost support program immediately after the 15- month deadline.

[51] Not surprisingly, GTE falls back on the term "sufficient" and argues that even if the FCC may slowly implement the high-cost support program, the statute still requires the agency to ensure that support is sufficient during

the transition period. For reasons that we have outlined, the FCC should be accorded a substantial amount of deference when interpreting this word. See supra part III.A.a.i.

GTE essentially asks us to hold that "sufficient" is violated whenever there is a change (or the possibility of a change) from the current levels of universal service support. The plain meaning of "sufficient" is far from unambiguous as it pertains to the timing of the high-cost support program's implementation. Calculating how much support is sufficient to provide support for universal service is a judgment the FCC is better able to make than are we, and we therefore defer to its reasonable interpretation under Chevron step-two.

As the agency explains, the amount of competition in local markets depends on a number of different factors, of which the implementation of the universal service plan is only one. To enter a new market, entrants must invoke rights to interconnection agreements under §§ 251 and 252. [FN78] In almost all cases, these agreements require lengthy arbitrations by state commissions. Even after the completion of such arbitrations, there may be many court challenges. Because only competition in local markets can erode the current implicit subsidy system to an insufficient level, the FCC made a reasonable determination that there was little ***437** chance of such competition's emerging in the near future.

> FN78. The Supreme Court did not issue its final word on these sections until January 25, 1999. See Iowa Utilities, 119 S.Ct. 721. In the meantime, many potential entrants were stymied in the arbitration process and by the uncertainty over the FCC's jurisdiction to implement its local competition

> order. Therefore, it is not surprising that the agency did not expect an onslaught of local competition during the interim period.

Where the statutory language does not explicitly command otherwise, we defer to the agency's reasonable judgment about what will constitute "sufficient" support during the transition period from one universal service system to another. We follow the Eighth Circuit's recent holding on a similar issue: "The Commission has made a predictive judgment, based on evidence in the record and adequately explained in the order, that competitive pressures in the local exchange market will not threaten universal service during the interim period until the permanent, explicit universal service support mechanisms have been fully implemented." Southwestern Bell, 153 F.3d at 537.

ii. TAKING.

[52] In some ways, GTE's takings argument is simply another version of its contention regarding lack of "sufficient" support. On both issues, GTE argues that the FCC's decision to leave ILEC's exposed to local competition without first implementing the new universal service plan results in a severe reduction of its revenues from local service. Relying on Brooks-Scanlon v. Railroad Comm'n, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323 (1920), GTE argues that a regulated entity cannot be forced to operate one segment of its business at a loss on the expectation that it can make up the shortfalls from another competitive line of business. At the very least, GTE says, the FCC should adopt a narrow construction of the statutory language to avoid any constitutional infirmities. [FN79]

FN79. See Edward J. DeBartolo Corp. v. Florida Gulf

Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988).

The FCC responds that before a narrowing construction should be considered, GTE must show that a taking will "necessarily" result from the regulatory actions. See United States v. Riverside Bayview Homes, 474 U.S. 121, 128 n. 5, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). Even if GTE can show that some taking will result, it must demonstrate that its losses are so significant that the "net effect" is confiscatory. See Duquesne, 488 U.S. at 310-16, 109 S.Ct. 609.

GTE has failed to meet the requirements of Duquesne, because it cannot show that it will lose any revenue at all, much less enough to constitute a taking under more recent precedent. Its attempt to distinguish Duquesne is misguided because, contrary to GTE's claim, the Duquesne Court did not base its finding of takings on the fact that the market was no longer closed to competition.

Rather, Duquesne stands for the proposition that "no single ratemaking methodology is mandated by the Constitution, which looks to the consequences a governmental authority produces rather than the techniques it employs." Duquesne, 488 U.S. at 299, 109 S.Ct. 609 (Scalia, J., concurring). Duquesne does not require courts to engage in a takings analysis whenever an agency opens a previously regulated market to competition. Further, as we explained in sustaining the forward-cost looking methodology, GTE's reliance on Brooks-Scanlon is misplaced, because we will not apply the rule in that case to transitional or temporary periods. See Continental Air Lines, 784 F.2d at 1251.

b. ACCESS CHARGES AT FORWARD-LOOKING COST LEVELS AS SOON AS COST MODELS ARE

AVAILABLE.

[53] MCI asks the FCC to reduce access charges--the fees charged by ILEC's on interstate calls--to the forward-looking cost level used by the agency to calculate support for high-cost areas. Under the FCC's plan, ILEC's will be required to reduce their access charges by the amount they receive in the form of explicit universal service subsidies. MCI argues that by permitting the ILEC's to retain the ***438** amount of access charge revenue above cost, the FCC has violated its statutory mandate to eliminate implicit subsidies when it implements the new universal service plan.

This argument differs from GTE's assertions. While GTE seeks immediate implementation of the explicit subsidy program, MCI seeks to include the elimination of implicit subsidies within the rubric of the explicit subsidy program. In fact, GTE's fear that implicit subsidies will be eroded during the transition period is precisely the goal of MCI's intervention. Because GTE does not seek the elimination of the implicit subsidies, it is making an argument different from MCI's.

For this reason, we agree with the FCC that MCI cannot properly intervene on this issue, because none of the petitioners raised the same challenges to the Order. In United Gas Pipe Line, 824 F.2d at 437, we held that "intervenors may not challenge aspects of the Commission's orders not raised in the petitions for review." Because MCI's challenge does not raise an issue brought up by any of the petitioners, we do not consider its arguments on appeal, but follow the District of Columbia Circuit and decline to grant intervenor standing in a situation in which "we could grant [the intervenor] the full relief it seeks while rejecting all of the petitioners' challenges, and vice versa." Illinois Bell Tel.

Co. v. FCC, 911 F.2d 776, 786 (D.C.Cir.1990). [FN80]

> FN80. MCI claims that the FCC is trying to evade review of this question through procedural maneuvering. When BellSouth, in its Eighth Circuit challenge to the Access Charge Order, raised the issue of the FCC's failure to remove all implicit subsidies, the agency argued that this question should be addressed in this court in challenges to the Universal Service Order. Now that MCI has raised that same issue, MCI argues that the agency should not be allowed to dodge review again on procedural grounds. Unfortunately for MCI, it was not any manipulation of procedural rules by the FCC that prevented MCI from properly raising this issue on appeal. There was no legal reason that prevented MCI from filing a brief as a petitioner rather than as an intervenor. Thus, the FCC's procedural moves are irrelevant for purposes of deciding whether MCI may properly intervene. The only question, then, is whether MCI's challenge to the Order for failing to reduce access charges immediately is the same as GTE's challenge to the Order for failing to implement explicit subsidies immediately. We see no such resemblance.

c. PLAN FOR TRANSITION TO A NEW UNIVERSAL SERVICE SYSTEM FOR RURAL, INSULAR, AND HIGH-COST AREAS.

The FCC's transition plan for its new explicit subsidy universal support system does not immediately apply to all ILEC's. All carriers eligible for universal service support will become part of the new system on January 1, 2000. Small rural carriers, however, will not be required to move

into the new system until 2001 at the earliest. See Order ¶ 204. Specifically, the agency (1) has exempted rural carriers, defined as those carriers serving study areas of less than 100,000 lines, from the new forward-looking cost methodology until at least January 1, 2001, [FN81] and (2) has allowed carriers with 200,000 or fewer working loops per study area to continue recovering extra support from the high-cost fund until implementation of the new methodology on January 1, 2000. See Order § 210.

FN81. See Order ¶ 273 (stating that "non-rural carriers" will come under the new forward-looking cost methodology).

i. ESTABLISHING A LONGER TRANSITION PERIOD FOR RURAL CARRIERS WITH FEWER THAN 100,000 LINES.

[54] Vermont [FN82] attacks the small rural carrier exemption because it does not permit large carriers who happen to serve rural areas the same delayed transitional treatment that rural carriers with study ***439** areas of less than 100,000 lines will receive. Vermont argues that there is no statutory or reasonable basis for distinguishing among rural carriers simply because of their size. For example, census statistics show that Vermont has more residents living in rural areas than does any other state, yet its carrier, Bell Atlantic, does not qualify for the same treatment as do other rural carriers as defined by the FCC's 100,000-line distinctions.

FN82. Kansas initially joined Vermont in this challenge but indicates, in its reply brief, that it now withdraws from this portion of the appeal.

Vermont does not point to any statutory authority for its

claim that the FCC must give all rural carriers the same treatment under the plan. Instead, it simply argues there is no good reason to treat Bell Atlantic differently from other rural carriers. For these reasons, it asks us to reverse on arbitrary-and-capricious grounds under the APA.

A statute survives judicial scrutiny under the APA's "arbitrary and capricious" standard as long as the agency "articulates a rational relationship between the facts found and the choice made" and "so long as the agency gave at least minimal consideration to relevant facts contained in the record." Harris, 19 F.3d at 1096. The FCC provides at least two reasons that articulate such a "rational relationship."

First, because the agency delayed the transition for rural carriers on the ground that its cost models for small carriers were inadequate, it was reasonable to treat Bell Atlantic differently. After all, Bell Atlantic is a large ILEC for which the FCC does have cost models. Second, the FCC justifies its delay for small rural carriers because it has found that they will have greater difficulty adjusting to a new system. Again, such a finding would not apply to Bell Atlantic. These reasons suffice.

ii. CONTINUING APPLICATION OF EXISTING HIGH-COST RULES UNTIL THE NEW UNIVERSAL SERVICE SYSTEM TAKES EFFECT.

[55] Vermont [FN83] challenges the decision to maintain extra support for ILEC's with study areas of 200,000 or fewer loops until the new methodology is implemented on January 1, 2000. In other words, by exempting carriers with 200,000 or fewer lines from the new high-cost support methodology, the FCC again decided to give extra support to smaller carriers, in this case defined as those carriers with study areas

containing 200,000 or fewer loops. As it did in challenging the 100,000 line distinction, Vermont asserts that the distinction is arbitrary and capricious because the FCC ignores evidence that size is not a reliable predictor of cost.

> FN83. Kansas initially joined Vermont in this challenge, but has indicated in its reply brief that it now withdraws from this portion of the appeal.

The FCC again argues that the 200,000-line rule is transitional, interim relief. The agency has stated that the extra support provided by this rule will expire when the new forward-looking cost methodology goes into effect on January 1, 2000. It asks us to accord it the "substantial deference" it needs to develop transitional solutions to complex regulatory problems. See MCI Telecomms. v. FCC, 750 F.2d 135, 140 (D.C.Cir.1984).

In contrast to the situation involving the rural carrier exemption, the FCC has set a specific date for the end of this transitional period: January 1, 2000. Accordingly, the agency's commitment to a specific date for termination of the support resulting from the 200,000-loop rule makes the rule sufficiently transitional to avoid judicial review. Therefore, for lack of ripeness, we will not review Vermont's challenge to the effects of the 200,000-loop distinction. [FN84]

> FN84. Vermont argues that the 200,000-loop distinction will become permanent through its incorporation into the "hold harmless" rule articulated in the Seventh Report and Order. As we have discussed, supra, we do not have jurisdiction to consider the merits of that new Order except in the way that it affects our review of the Order. The "hold harmless" principle was introduced in the Seventh

Report and Order and remains outside the scope of this proceeding.

***440** B. SUBSIDIZATION OF SERVICES FOR SCHOOLS, LIBRARIES, AND HEALTH CARE PROVIDERS.

Section 254(h) adds a new wrinkle to the concept of universal service by directing the FCC to provide support to elementary and secondary schools, libraries, and health care providers. Thus, the agency has a new statutory mandate to subsidize support for certain beneficiaries, irrespective of whether they are high-cost consumers. GTE raises objections to the agency's implementation of this broad statutory mandate, [FN85] and Cincinnati Bell and the states challenge the proposal to assess contributions to this new universal service fund.

FN85. As a threshold matter, GTE challenges the timing of the proposal, because it would require support for schools, libraries, and health care providers before the new system for explicit subsidies has been implemented. For the same reasons we have discussed, see supra part III.A.6.1., we extend the FCC greater discretion in deciding what will be "sufficient" during the transition period, especially when there is little reason to believe that the old subsidy system will break down during that period.

1. MANDATING SUPPORT FOR INTERNET ACCESS AND INTERNAL CONNECTIONS TO SCHOOLS AND LIBRARIES.

[56] While section 254(h) plainly authorizes the FCC to support discounted telecommunications services to schools

and libraries, GTE finds no equivalent statutory authority to support discounted internet access and internal connections. Therefore, GTE argues that the agency exceeded its statutory authority when it mandated support for discounted internet services and internal connections.

Although we agree with GTE that the statute and its legislative history do not support the FCC's interpretation, the language of the statute is ambiguous enough to require deference under Chevron step-two. Because, however, the FCC's decision to extend universal service support to internet access and internal connections raises grave doubts as to whether § 254(h) creates an unconstitutional tax, we construe the statute narrowly to avoid raising these constitutional problems.[FN86]

> FN86. Judge Garza does not join our analysis of the constitutional issues raised by the FCC's decision to provide discounts on internet services for schools and libraries, set forth in note 97, infra. He would not address these issues, because the parties did not raise them on appeal. See Carducci v. Regan, 714 F.2d 171, 177 (D.C.Cir.1983) (refusing to consider a constitutional issue of first impression "where counsel has made no attempt to address the issue" and "where, as here, important questions of far-reaching significance are involved"). But see United States Nat'l Bank v. Independent Ins. Agents of Am., 508 U.S. 439, 446, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (approving lower court's consideration of legal claim not argued by either party as part of courts' "independent power to identify and apply the proper construction of governing law") (internal quotations omitted); United States v.

> Moore, 110 F.3d 99, 101 (D.C.Cir.1997) (en banc) (Silberman, J., dissenting) (conceding that the "rigor and integrity of Carducci was severely impaired by the unanimous decision of the Supreme Court" in Independent Insurance Agents).

The FCC concedes that internet access and internal connections cannot be defined as "telecommunications services" for purposes of the section. [FN87] It argues, however, that the plain language of § 254(h)(1)(B) and (c)(3) authorizes it to require discounted internet access and internal connections to schools and libraries (but not to health care providers).

> FN87. The FCC has recognized that internet access or internal connection services are "information services" that cannot be equated with "telecommunications services." See Order ¶ 439 n.1145.

Subsection 254(h)(1)(B) requires all telecommunications providers to provide to elementary schools, secondary schools, and libraries, on request, discounted services "that are within the definition of universal service under subsection (c)(3) of this section." Subsection (c)(3) authorizes the FCC to designate "additional services for such support mechanisms for schools, libraries, and health care providers for the ***441** purposes of subsection (h) of this section." These "additional services" are "[i]n addition to services included in the definition of universal service under paragraph (1)," which defines universal service as an "evolving level of telecommunications services."

The FCC points out that there is no language restricting these

"additional" services to telecommunications services. Furthermore, Congress used the limiting term "telecommunications services" in § 254(h)(1)(A) when discussing the provision of universal service support for rural health care providers. The agency argues that "the varying uses of the terms 'telecommunications services' and 'services' in § 254(h)(1)(A) and (B) suggests that the terms were used consciously to signify different meanings." Order ¶ 439. Therefore, the FCC concluded that the term "additional services" is not limited to telecommunications services. It then decided that, based on the legislative history and its understanding of the purposes of the statute, it should require internet access and internal connections [FN88] support for schools and libraries.

> FN88. Calling "internal connections" a good and not a service, GTE separately attacks the "internal connections" requirement. The FCC argues that courts have recognized internal connections as services, see NARUC v. FCC, 880 F.2d 422, 430 (D.C.Cir.1989), and that the legislative history's emphasis on connections to "classrooms" makes such a requirement reasonable. Given that the maintenance and installation of regular telephone lines also is characterized as a "service," we reject GTE's attempt to distinguish "internal connections."

We first consider whether the FCC's interpretation conflicts with the plain language of § 254(h)(1)(B) and (c)(3). Although the best reading of the statute does not authorize the agency's actions, we find the statute sufficiently ambiguous to invoke step-two of Chevron.

The statute restricts the FCC's authority to interpret the phrase "additional services" in subsection (c)(3) to "the purposes of subsection (h) of this section." The use of the phrase "telecommunications services" in the title of § 254(h) indicates that the "purposes of subsection (h)" are to provide discounted support for telecommunications services. [FN89]

> FN89. See United States v. Wallington, 889 F.2d 573, 577 (5th Cir.1989) (stating that the "section heading enacted by Congress in conjunction with statutory text [is considered] to 'come up with the statute's clear and total meaning.' " (citation omitted)).

We find further support for this reading in the legislative history of § 254(h): "New subsection (h) of section 254 is intended to ensure that health care providers for rural areas, elementary and secondary school classrooms, and libraries have affordable access to modern telecommunications services...." [FN90] The House Conference Report also elaborates on the interaction between subsections (h)(1)(B) and (c)(3):

> FN90. H.R. CONF. REP. 104-458, at 132 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. at 124, 144.

> New section (h)(1)(B) requires that any telecommunications carrier shall, upon a bona fide request, provide services for educational purposes included in the definition of universal service under new subsection (c)(3) for elementary and secondary schools and libraries at rates that are less than the amounts charged for similar services to other parties, and are necessary to ensure affordable access to and use of such telecommunications services. [FN91]

FN91. H.R. CONF. REP. 104-458, at 133 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. at 144.

And while the legislative history of subsection (c)(3) supports giving the FCC discretion when designating services for schools and libraries, it nevertheless describes the subsection (c)(3) definition as "applicable only to public institutional telecommunications users." [FN92] This language provides more evidence that Congress intended that ***442** the FCC designate additional telecommunications services under subsection (c)(3) rather than any additional services that the agency deems desirable.

FN92. Id.

Indeed, the agency's broad reading of "additional services" would mean that the use of the word "services" in other parts of § 254(c) could be broadened to include non-telecommunications services. For instance, § 254(c)(2) authorizes the Joint Board to recommend modifications to the definition of "services." Under the FCC's interpretation, the Joint Board (composed of state telecommunications regulators and members of the FCC) could be free to redefine "services" to include services unrelated to telecommunications. This result is an implausible reading of Congress'sintent. [FN93]

FN93. We also agree with GTE that the FCC is asserting unlimited authority to prescribe support for whatever it wishes. At oral argument, counsel for the FCC could not point out how its interpretation could be limited even to internet access services. For

> instance, the agency could not explain why satellite television services or even janitorial services would not fit within its understanding of "additional services." In contrast, the plain language of § 254 provides an easily recognizable limit on FCC authority by confining § 254(h) support to telecommunications services. The superiority of GTE's reading, however, does not necessarily make Congress's intent unambiguous.

This is not the end of the analysis, however, because some aspects of the statute's language and legislative history also support the FCC's reading. First, the plain language of § 254(c)(1) invites the FCC periodically to re- define "universal service" to "tak[e] into account advances in telecommunications and information technologies and services." Moreover, the "purposes of subsection (h)" language in subsection (c)(3) could include more than the "telecommunications services" referred to in § 254(h)'s section heading. After all, subsection (h)(2)(A), which is also one of the "purposes of subsection (h)," instructs the FCC to establish competitively neutral rules to "enhance ... access to advanced telecommunications and information services...."

Finally, some of the legislative history implies that Congress intended for subsection(h) to support internet access:

> [T]he provisions of subsection (h) will help open new worlds of knowledge, learning and education to all Americans--rich and poor, rural and urban. They are intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to

Americans everywhere via schools and libraries. [FN94]

FN94. H.R. CONF. REP. 104-458, at 132 (1996), reprinted in 1996 U.S.C.C.A.N. at 144.

The reference to "brows[ing] library collections" indicates that in drafting subsection (h), Congress envisioned some kind of support for internet access.

The best reading of the relevant statutory language nonetheless indicates that the FCC exceeded its authority by mandating discounts for internet access and internal connections. The statutory invitation in subsection (c)(1) to "re- define" universal service to include information services does not necessarily relate to the FCC's authority under subsection (c)(3).

Additionally, subsection (h)(2)(A) provides the agency only with authority to "establish competitively neutral rules to enhance access" to information services. It does not contain specific language supporting provision of such services "at rates less than the amounts charged for similar services to other parties," as in subsection (h)(1)(B). And finally, the legislative history does not indicate whether Congress thought the statute would enhance access to internet services through discounts on telecommunications services or, instead, through direct subsidies for internet access.

[57] Even though GTE has offered a persuasive reading of the statute, its plain language does not make Congress's intent ***443** sufficiently "unambiguous" for Chevron step-one review. Therefore, we defer to the FCC's interpretation under Chevron step-two and affirm those aspects of the Order providing internet services and internal connections to schools and libraries. [FN95]

FN95. Before we defer to the FCC's interpretation of an ambiguously worded statute under the deferential Chevron step-two standard of review, we consider whether the agency's approach raises constitutional problems that should lead us to construe the statute in the manner urged by GTE. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Jones v. United States, 526 U.S. 227, ----, 119 S.Ct. 1215, 1222, 143 L.Ed.2d 311 (1999) (internal citations omitted). This rule "has for so long been applied by this Court that it is beyond debate." DeBartolo, 485 U.S. at 574-75, 108 S.Ct. 1392. It is also of such importance that a court will reject an agency interpretation of a statute that would ordinarily receive deference under Chevron step-two if it believes the agency's reading raises serious constitutional doubts. Id. (construing statute narrowly to avoid First Amendment problem).

We have identified two ways in which the agency's interpretation could raise constitutional concerns that might lead us to construe the statute more narrowly. First, the FCC's application of the universal service fund for non-telecommunications 'services could constitute an improperly delegated tax. Second, its interpretation of the reach of § 254(h)(1)(B) could have transformed the Act into a "bil[l] for raising revenue" in violation of the Origination Clause.

Though it is a close question, we conclude that the FCC's interpretation does not raise sufficiently serious constitutional doubts to override our normal Chevron step-two deference. While the relationship between internet services and the public telecommunications

network is more attenuated than is that of paging services, see supra part III.A.5.a, we are not convinced that even this attenuated relationship raises serious doubts under Munoz-Flores. For similar reasons, this attenuated relationship does not raise serious doubts as to whether the FCC's interpretation makes the assessment an improperly delegated tax. See Rural Tel. Coalition v. FCC, 838 F.2d 1307, 1314 (D.C.Cir.1988) (rejecting unconstitutional tax challenge to universal service support allocation finding).

2. AUTHORITY TO PROVIDE SUPPORT PAYMENTS TO NON-TELECOMMUNICATIONS ENTITIES THAT PROVIDE INTERNET ACCESS AND INTERNAL CONNECTIONS TO SCHOOLS AND LIBRARIES.

[58] The FCC invokes its rulemaking power under § 254(h)(2)(A) and its "necessary and proper" authority under § 154(i) to provide support payments to non-telecommunications entities that provide internet access and internal connections to schools and libraries. GTE attacks this decision as violating the express intent of Congress as read through the plain language of the statute.

The FCC does not argue that any specific provision of the statute authorizes it to add non-telecommunications companies to the universal service payment system. Rather, it avers that (1) the statute gives it broad authority to establish competitively neutral rules; (2) the statute does not speak directly to the issue of non-telecommunications providers; and (3) the statute's silence indicates that the agency should receive Chevron deference.

[59] GTE relies on the traditional maxim of statutory construction, "expressio unius estexclusio alterius." [FN96] GTE points out that § 254(h)(1)(B) already discusses how carriers will be reimbursed for providing discounted services: "[a] telecommunications carrier providing service under this paragraph...." According to GTE, Congress's choice of the phrase "telecommunications carrier" precludes the FCC from providing those same payments to non-telecommunications carriers.

> FN96. "The expression of one thing implies the exclusion of another." "Hence, a statute that mandates a thing to be done in a given manner ... normally implies that it shall not be done in any other manner...." 73 AM.JUR.2D Statutes § 211 (1995).

We conclude that the combination of the FCC's "necessary and proper" authority under § 154(i) and the limited usefulness of the expressio unius doctrine in the administrative ***444** context permit the FCC to expand the reach of universal support to non-telecommunications carriers. While courts have rightly warned against using silence in a statute to give "agencies virtually limitless hegemony," [FN97] we are convinced that Congress intended to allow the FCC broad authority to implement this section of the Act.

> FN97. Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C.Cir.1995).

In Iowa Utilities Board v. FCC, the Eighth Circuit offered this explanation of the reach of § 154(i) in denying the FCC jurisdiction over the pricing of local telephone service: "[Section 154(i)] merely suppl[ies] the FCC with ancillary authority to issue regulations that may be necessary to fulfill

its primary directives contained elsewhere in the statute. [It does not] confer [ ] additional substantive authority." 120 F.3d 753, 795 (8th Cir.1997). In this matter, however, the FCC is not asserting additional substantive authority, as it tried to do in Iowa Utilities. It is not asserting additional jurisdictional authority, but, rather, is issuing a regulation "necessary to fulfill its primary directives."

The agency's primary directive is to "enhance access to advanced telecommunications and information services" for schools and libraries. See § 254(h)(2)(A). It is taking modest steps to ensure that Congress's instructions on expanding universal service in the form of internet access and internal connections will not be frustrated by local monopolies. [FN98] For these reasons, we affirm the decision to permit support of non- telecommunications carriers providing internet access and internal connections to schools and libraries.

> FN98. The District of Columbia Circuit has upheld FCC actions under § 154(i) that require payments from parties even without express statutory authorization. See Mobile Communications Corp. of Am. v. FCC, 77 F.3d 1399 (D.C.Cir.1996); New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101 (D.C.Cir.1987).

3. ENCROACHING ON STATE AUTHORITY TO SET DISCOUNT RATES FOR INTRASTATE SERVICES TO SCHOOLS AND LIBRARIES.

[60] Section 254(h)(1)(B) divides the regulation of discount rates on services offered to schools and libraries between the FCC and the states. "The discount shall be an amount that the Commission, with respect to interstate services, and the

States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities." § 254(h)(1)(B).

The FCC has decided to offer federal universal service funds to help support the intrastate rate discounts. Predictably, the agency has conditioned such funding on the states' "establish[ing] intrastate discounts at least equal to the discounts on interstate services." Order ¶ 550. GTE challenges this condition as an encroachment on the states' statutory right to "determine [what is] appropriate and necessary to ensure affordable access."

GTE has failed to point to any statutory or other authority prohibiting the FCC's condition for funding. States are free to refuse federal support for intrastate discounts and, therefore, remain free to determine what is "appropriate and necessary," consistent with the plain language of the statute. In the Tenth Amendment context, this court has refused to view similar federal conditional grants as "equivalent to coercion." See Texas v. United States, 106 F.3d 661, 666 (5th Cir.1997). Without express statutory language prohibiting such a practice, we reject GTE's challenge to the FCC's funding conditions.

4. EXERCISING AUTHORITY IN DECIDING THAT SCHOOLS AND LIBRARIES CAN OBTAIN DISCOUNTS ON ALL COMMERCIALLY AVAILABLE TELECOMMUNICATIONS SERVICES.

[61] The FCC has also decided that, pursuant to its authority under § 254(c)(3), it will allow schools and libraries to obtain supported discounts on all commercially ***445** available telecommunications services. The agency believes that this approach will maximize schools' and libraries'

flexibility to purchase whatever package of services they need.

GTE challenges the agency's statutory authority to refuse to limit the types of services that will be available for support. It contends that the plain language of § 254(c)(3) requires the FCC to "designate" which telecommunications services will receive universal service support and which telecommunications services will not. The key to GTE's argument is the meaning of "designate."

According to GTE, "designate" denotes some action of specific selection. The standard dictionary definition of "designate" includes "to distinguish as to class" and "to indicate and set apart for a specific purpose, office, or duty." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 313 (10th ed.1994). GTE claims that by using the word "designate," Congress instructed the FCC to "indicate and set apart" which services may receive support under § 254(h). GTE also finds support in the legislative history, which says the FCC should "take into account the particular needs of ... schools and libraries." [FN99]

> FN99. See H.R. CONF. REP. 104-458, at 133 (emphasis added), reprinted at 1996 U.S.C.C.A.N. at 144.

We disagree with GTE that the plain-meaning understanding of "designate" demonstrates Congress's unambiguous intent to require the FCC to specify which services will be supported. By using the word "designate," Congress also could have meant for the agency to authorize a broad class of services. Thus, by "designating" all commercially available telecommunications service, the FCC can be said to have "designated" which services may be supported. For this

reason, the designation "commercially available telecommunications services" does not violate the plain meaning of the statute under Chevron step-one.

Under Chevron step-two, the FCC has reasonably concluded that it can fulfill its statutory duty to "designate" while giving schools and libraries the maximum flexibility to choose which services they need. It is not unreasonable for the FCC to conclude that it could best "take into account ... the particular needs" of schools and libraries by allowing support for all commercially available telecommunications services. [FN100] Because Congress's use of "designate" in subsection (c)(3) does not unambiguously require the FCC to limit which services may be supported, and because the FCC's decision is reasonable under Chevron step-two, we reject GTE's request and affirm the decision to allow schools and libraries to obtain support for all "commercially available telecommunications services."

> FN100. The FCC further concluded that its decision will ensure that schools and libraries can obtain discounted "state-of-the-art telecommunications technologies as those technologies become available." Order ¶ 433.

5. AUTHORITY TO SUBSIDIZE TOLL-FREE TELEPHONE CALLS TO INTERNET SERVICE PROVIDERS BY NON-RURAL HEALTH CARE PROVIDERS.

[62] Congress directed the FCC to provide universal service support for "any public or nonprofit health provider that serves persons who reside in rural areas." § 254(h)(1)(A). Congress also instructed the agency "to enhance, to the extent technically feasible and economically reasonable, access to

advanced telecommunications and information services for all public and nonprofit ... health care providers." The FCC has seized on the more general language in the second provision as authority for subsidizing telephone calls to internet service providers by both rural and non-rural health care providers.

GTE advances an argument based on the expressio unius canon. Because the first provision gives specific instructions on ***446** providing subsidized support for health care providers and explicitly limits that support to rural health care providers, GTE argues that the FCC has no statutory authority to expand such support to non-rural health care providers. In GTE's view, Congress could have extended support to non-rural providers, but chose not to. This signifies a Congressional decision that the FCC should respect.

The FCC responds that the expressio unius canon should not resolve a question of statutory interpretation in an administrative law context. Additionally, it argues that § 254(h)(2)(A) obligates the FCC to "enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services."

We do not read § 254(h)(2)(A)'s "enhancing" language to require the FCC to act as it did here. But, we conclude that the language in § 254(h)(2)(A) demonstrates Congress's intent to authorize expanding support to "advanced services," when possible, for non-rural health providers.

GTE has already established that § 254(h)(1)(A) requires support for telecommunications service to rural health care providers only. We can then read § 254(h)(2)(A) as an instruction to the FCC to work to support "advanced services" for non-rural health care providers when

"economically reasonable." Importantly, the FCC's plan does not extend, to non-rural health providers, the same telecommunications discounts enjoyed by § 254(h)(1)(A) rural health providers. Rather, the agency chose to support access (through subsidized telephone calls) to an "advanced ... information service" (an internet service provider), finding that this subsidy was "economically reasonable" and "technically feasible." Order ¶ 748.

The FCC has found a way to "enhance access," as authorized by the plain language of § 254(h)(2)(A), so we affirm this portion of the Order.

6. CONTRIBUTION SYSTEM TO PROVIDE UNIVERSAL SERVICE FUNDING FOR SCHOOLS, LIBRARIES, AND RURAL HEALTH PROVIDERS.

[63] The FCC decided to fund the universal support mechanisms for schools, libraries, and rural health care providers by "assessing both the interstate and intrastate revenues of providers of interstate telecommunications services." Order ¶ 808. The uncertainty of state support for the new § 254(h) subsidies and other financial considerations, according to the FCC, justifies assessing both the intrastate and interstate revenues of interstate carriers.

Cincinnati Bell ("CBT"), a small carrier with a mostly intrastate revenue base, attacks the decision as a violation of § 2(b)'s prohibition on federal regulation of intrastate services. The states challenge the FCC's related assertion that it has the authority to require carriers to recover their intrastate contributions from the states.

a. AUTHORITY TO ASSESS CONTRIBUTIONS ON THE COMBINED INTERSTATE AND INTRASTATE

REVENUES OF CARRIERS THAT PROVIDE INTERSTATE TELECOMMUNICATIONS SERVICES.

Along the same lines as Bell Atlantic's challenge to the "no disconnect" rule, CBT argues that the FCC's decision to assess intrastate revenues exceeds its jurisdiction, in violation of the still-intact Louisiana PSC reading of § 2(b). CBT contends that unlike the provisions considered in Iowa Utilities, § 254 does not "apply" to intrastate matters in a sufficiently unambiguously manner so as to confer federal jurisdiction.

As we have discussed, we understand § 2(b) to serve as both a rule of statutory construction in considering whether a provision applies to intrastate matters and as a jurisdictional fence against assertions of the FCC's ancillary jurisdiction. See Iowa Utilities, 119 S.Ct. at 731. Like Bell Atlantic, CBT is using § 2(b) to challenge the ***447** FCC's construction of § 254 to apply to intrastate ratemaking.

The FCC's first defense denies that its actions even constitute a "regulation" that would fall under the rule of statutory construction created by § 2(b) and Louisiana PSC. The agency argues that simply factoring intrastate revenues into calculations of universal service contributions does not constitute regulation of those services. The FCC has used both intrastate and interstate revenues as a basis for imposing accounting obligations or tariff requirements in other contexts without any court's finding § 2(b) violations. Additionally, the FCC has stated that carriers may recover their contributions only from interstate rates. The agency believes this last requirement will prevent its contribution requirements from improperly affecting intrastate rates.

Despite the persuasiveness of this argument, we conclude

that § 2(b)'s broad language encompasses the FCC's decision to assess intrastate revenues. The plain language of § 2(b) discusses "jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service...." We agree with CBT that the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a "charge ... in connection with intrastate communication service."

The plain language of § 2(b) directs courts to consider FCC jurisdiction over a very broad swathe of intrastate services. We decline to exempt the FCC's assessment of intrastate revenues from the ambit of § 2(b). [FN101]

> FN101. The FCC's decision to prohibit carriers from recovering through intrastate rates does not save it from § 2(b) analysis. There is no question that the amount of a carrier's universal service contributions will increase with the inclusion of intrastate revenues. This cost, even if recovered only through interstate revenues, still constitutes a "charge in connection with intrastate service" under § 2(b).
> If the point of § 2(b) was to protect state authority over intrastate service, allowing the FCC to assess contributions based on intrastate revenues could certainly affect carriers' business decisions on how much intrastate service to provide or what kind it can afford to provide. This federal influence over intrastate services is precisely the type of intervention that § 2(b) is designed to prevent.

The FCC then contends that § 254 does apply to intrastate matters, because it unambiguously authorizes the agency to develop universal service mechanisms that are sufficient to

support both interstate and intrastate service. In support of this assertion, the agency points to § 254(d)'s requirement that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute ... to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." The FCC then compares this language to § 254(f), which allows states to adopt universal service regulations as long as they do not "rely on or burden Federal universal service support mechanisms." This language, the FCC claims, shows that Congress intended for it to bear the primary responsibility for ensuring the sufficiency of universal service for both interstate and intrastate services.

These two provisions do not reflect enough of an unambiguous grant of authority to overcome the presumption established by § 2(b). While, under Chevron step-two, we usually give the agency deference in its interpretation of ambiguous statutory language, the Supreme Court continues to require the agency to overcome the § 2(b) statutory presumption with unambiguous language showing that the statute applies to intrastate matters. See Iowa Utilities, 119 S.Ct. at 731.

While the text of the statute does not impose any limitation on how universal service will be funded, it also does not explicitly state that the FCC has the responsibility to fund intrastate universal services. The agency seeks authority "in the broad language" of the statute, but ***448** "we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b)." See Iowa Utilities, 119 S.Ct. at 731 (quoting Louisiana PSC, 476 U.S. at 377, 106 S.Ct. 1890).

Without a finding that § 254 applies, the FCC has no other

basis to assert jurisdiction, because Iowa Utilities explicitly prohibits FCC jurisdiction over intrastate matters stemming from the agency's plenary powers. See id. Therefore, we reverse that portion of the Order that includes intrastate revenues in the calculation of universal service contributions.

b. AUTHORITY TO REFER CARRIERS TO THE STATES TO SEEK RECOVERY OF INTRASTATE CONTRIBUTIONS.

Though it stated that it had "the authority to refer carriers to the states to seek authority to recover a portion of their intrastate contribution from intrastate rates," Order ¶ 818, the FCC also declined to exercise this authority. Instead, it directed carriers to recover their contributions from interstate revenues only.

The states and CBT challenge this assertion of authority on the same grounds they question the inclusion of intrastate revenues for universal service contributions. Because the FCC bases its authority on the same provisions it cited on that issue, our decision to deny the agency jurisdiction on that question applies equally to the its claim of authority to assess intrastate rates.

The FCC also raises a prudential defense, arguing that because it has not chosen to exercise its authority, the issue is not yet ripe for judicial review. Additionally, the agency argues that both petitioners lack standing. We do not accept either of these prudential defenses.

i. RIPENESS.

[64] Conceding that the FCC has not yet acted on its decision to assert authority over intrastate services, the states reject the

agency's ripeness claim because the "question presented is purely legal." See New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 833 F.2d 583, 587 (5th Cir.1987). [FN102] Pointing also to Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), the states argue that when the FCC has asserted its authority in a final decision on a legal question such as its jurisdiction over intrastate rates, "one does not have to await the ultimate impact of the threatened injury to obtain preventive relief." See id. at 201, 103 S.Ct. 1713.

> FN102. In its most recent action, the FCC reaffirmed its jurisdictional authority to require carriers to contribute based on both intrastate and interstate revenues. See Seventh Report and Order ¶¶ 87-90. In fact, the FCC appears to be awaiting a decision by this court before taking further action: "Accordingly, pending further resolution of this matter by the Fifth Circuit, the assessment base and recovery base for contributions to the high-cost and low-income universal service support mechanism that we adopted in the First Report and Order shall remain in effect." Seventh Report and Order ¶ 90. This invitation to judicial action further undercuts the FCC's ripeness defense.

This issue is ripe for judicial review. The two factors for considering ripeness--fitness for judicial decision and hardship to the parties--support our consideration of this question. Courts should be able to resolve a question such as jurisdiction and authority under the Act. Additionally, the states already have shown one example of the harm in withholding review. For instance, MCI, in the face of state

opposition, has already begun billing some customers based on revenue from intrastate calls. [FN103]

> FN103. MCI has filed a supplemental brief rejecting this characterization. It relies on MCI Telecomm. Corp. v. Virginia State Corp. Com'n, 11 F.Supp.2d 669 (E.D.Va.1998), vacated as moot, 1999 WL 302325 (4th Cir.1999) (unpublished), in which the court granted MCI's motion for injunctive relief from a Virginia state commission's order and ruling that MCI's disputed charges were not charges for intrastate calls. MCI also points to the FCC's recent order rejecting Virginia's administrative petition of the same issue. See Virginia State Corp. Com'n v. MCI Telecomm. Corp., No. E-99-01.FCC 99-42 (released Mar. 22, 1999). This ruling actually supports the states' ripeness argument, however, because the district court's final order on this question, along with the FCC's recent order, further demonstrates the propriety of judicial review of this question.

*449 ii. STANDING.

[65][66] The FCC's standing defense has even less merit. First, states have a sovereign interest in "the power to create and enforce a legal code." See Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). Moreover, the FCC's refusal to exercise its declared authority does not deprive states of standing. The states point out that the District of Columbia Circuit will not find a lack of standing simply because an agency has refused to enforce its own regulations. See Alaska v. United States Dep't of Transp., 868 F.2d 441, 444 (D.C.Cir.1989). For the same reasons, we also reject the FCC's standing defense.

iii. MERITS.

[67] Having disposed of the FCC's prudential defenses, we reverse its claim that it can refer these carriers to the states for recovery of those contributions. This is for the same reasons that we reject the agency's assertions of jurisdiction to assess intrastate revenues for contributions. The FCC has failed to point to any statutory authority that explicitly demonstrates how § 254 applies to intrastate universal service. Therefore, we deny the agency's claim of jurisdiction and reverse this portion of the Order. [FN104]

> FN104. Having concluded that the FCC has no jurisdiction over intrastate rates for universal service purposes, we do not reach CBT's final argument challenging the agency's requirement that carriers recover their contributions solely from interstate revenues.

IV. CONCLUSION.

It is difficult to disagree with the Supreme Court's assessment that the Act is "a model of ambiguity or indeed even self-contradiction." Iowa Utilities, 119 S.Ct. at 738. As the Court notes, Congress realizes that many of these ambiguities will be resolved by the FCC during its implementation of the statute, and we, like the Court, generally defer to the agency's interpretation of the sometimes-mysterious sections. See Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778. In this case, we have done so, and we affirm most aspects of the Order implementing the universal service program and dismiss challenges to several parts of the Order as moot.

Still, our deferential approach does not require us to affirm

the FCC in every circumstance. In particular, the agency exceeded its statutory authority in (1) prohibiting the states from imposing eligibility requirements and (2) requiring ILEC's to recover their contributions from access charges. Applying the Court's most recent pronouncements on the Act, we also deny the FCC jurisdiction over state control of local service disconnections and universal service contributions based on intrastate revenues. We remand one petition to the agency for reconsideration, so it can reconsider the propriety of assessing the international revenues of interstate carriers.

For the reasons stated, the petitions for review are GRANTED IN PART and DENIED IN PART. The May 8, 1997, Universal Service Order is AFFIRMED in part, REMANDED in part, and REVERSED in part, in accordance with this opinion.

END OF DOCUMENT

TEXAS OFFICE OF PUBLIC UTILITY COUNSEL; Celpage, Inc.; Southwestern Bell Telephone Company; GTE Midwest, Inc.; Louisiana Public Service Commission, an Executive Branch Department of the State of Louisiana; COMSAT Corporation; People of the State of California; Public Utilities Commission of the State of California; Iowa Utilities Board; South Dakota Public Utilities Commission; Pennsylvania Public Utility Commission; Bell Atlantic Telephone Companies; Vermont Department of Public Service; GTE Service Corporation; GTE Alaska Incorporated; GTE Arkansas Incorporated; GTE California Incorporated; GTE Florida Incorporated; GTE South Incorporated; GTE Southwest Incorporated; GTE North Incorporated; GTE Northwest Incorporated; GTE Hawaiian Telephone Company Incorporated; GTE West Coast Incorporated; Contel of California, Inc.; Contel of Minnesota, Inc.; Contel of the South, Inc.; Public Service Commission of Nevada; Cincinnati Bell Telephone Company; Florida Public Service Commission; People of the State of New York; Public Service Commission of the State of New York; and The State Corporation Commission of the State of Kansas, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 97-60421.
United States Court of Appeals,
Fifth Circuit.

09/28/99 COURT Order filed - The petitions for rehearing are DENIED, and no member of this panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petitions for rehearing en banc are DENIED. Issue

Mandate due on 11/1/99. (JES/JMD/EMG*) *Chief Judge King and Judges Jolly, Higginbotham, Jones, and Barksdale did not participate in the consideration of the petitions for rehearing or the petitions for rehearing en banc. [97-60421, 97-60459, 97-60480, 97-60481, 97-60549, 97-60560, 97-60579, 97-60580, 97-60584, 97-60585, 97-60586, 97-60587, 97-60588, 97-60657, 97-60684, 97-60731, 97-60755]

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47 U.S.C.A. § 254

§ 254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State- appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations

from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the

preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the

extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and

sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional

specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other

customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall--

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules-

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public

and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for- profit business, is a school described in paragraph (5)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C.A. § 9121 et seq.].

(5) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in

paragraphs (14) and (25), respectively, of section 8801 of Title 20.

(B) Health care provider

The term "health care provider" means--

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and

affordable.

(j) Lifeline Assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

CREDIT(S)

1999 Electronic Update

(Pub.L. 104-104, Title I, § 101(a), Feb. 8, 1996, 110 Stat. 71; Pub.L. 104- 208, Div. A, Title I, § 101(e) [Title VII, § 709(a)(8)], Sept. 30, 1996, 110 Stat. 3009-313.)

47 U.S.C.A. § 254

47 USCA § 254

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47 U.S.C.A. § 332
§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public

interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after

August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State)

from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the

State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this

subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to- home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall

prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

CREDIT(S)

(June 19, 1934, c. 652, Title III, § 332, formerly § 331, as added Sept. 13, 1982, Pub.L. 97-259, Title I, § 120(a), 96 Stat. 1096; renumbered § 332, Oct. 5, 1992, Pub.L. 102-385, § 25(b), 106 Stat. 1502, and amended Aug. 10, 1993, Pub.L. 103-66, Title VI, § 6002(b)(2)(A), 107 Stat. 393; Feb. 8, 1996, Pub.L. 104-104, § 3(d)(2), Title VII, §§ 704(a), 705, 110 Stat. 61, 151, 153.)

47 U.S.C.A. § 332

47 USCA § 332

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CONGRESSIONAL BUDGET OFFICE

COST ESTIMATE

July 19, 1995

1. BILL NUMBER: H.R. 1555

2. BILL TITLE: Communications Act of 1995

3. BILL STATUS:

As ordered reported by the House Committee on Commerce on May 25, 1995.

4. BILL PURPOSE:

H.R. 1555 would remove many restrictions on competition in telecommunications markets.

Title I would require local telephone companies to negotiate to provide for service connections with any requesting telecommunications carrier, and would establish procedures for such connections. It would forbid states and local governments from preventing any entity from providing telecommunications services. Title I also would permit regional Bell operating companies to compete with long-distance carriers, under certain circumstances. It would require the Federal Communications Commission (FCC) to convene a federal-state joint board to make recommendations on the preservation of universal telecommunications services at affordable rates to all Americans. The title states several principles on which the joint board would be required to base its recommendations, including the principles that services offered should be reasonably comparable between urban and

rural areas, that rates should be just and reasonable, and that all providers of telecommunications services should make equitable and nondiscriminatory contributions to universal service. The FCC would be required to complete action on the joint board's recommendations within one year after the bill's enactment.

Title I would permit telecommunications companies to use flexible pricing of services, abolish rate-of-return-regulation, and eliminate pricing regulation under certain circumstances. Title I also would permit the Bell operating companies to manufacture and provide telecommunications equipment, engage in electronic publishing through affiliates and joint ventures, and provide alarm monitoring and telemessaging services under certain conditions. It would restrict the conditions under which a caller to a toll-free number could be charged for the information conveyed during the call. Finally, Title I would authorize appropriations to the FCC to implement the bill, and would permit the FCC to adjust certain fees to offset those appropriations.

Title II would permit telephone companies to offer cable television services under certain circumstances, and would establish procedures under which those companies could enter the cable television market. It would prohibit telephone companies from acquiring cable systems within their telephone service areas, with certain exceptions. Title II also would deregulate cable companies that the FCC finds are subject to effective competition, permit cable operators to make certain rate changes, restrict the FCC's authority to review rate increases, and make other changes to regulations governing cable television.

Title III would prescribe procedures for issuing licenses for advanced television (ATV). It also would provide for the

transition from the current standard of television broadcasting to that of ATV, and for the return and reassignment by auction of part of the radio spectrum currently allocated to television broadcasting. It would require the FCC to adopt regulations that would permit broadcast licensees to offer ancillary or supplemental services using frequencies allocated to broadcasting, if the FCC determines that those activities are consistent with the public interest. It would require the FCC to collect a fee from licensees offering ancillary or supplemental services, under certain circumstances, and would permit the FCC to retain amounts necessary to pay for regulating ATV services. Title III would reduce, and in some cases remove, restrictions on the ownership of television stations and other media of mass communications.

Title IV would provide that the bill would supersede the Modification of Final Judgment (the decree entered on August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192, United States District Court, District of Columbia). It would exempt providers of direct-to-home satellite services from taxation by local jurisdictions. Title V would define various terms and make conforming amendments. Title VI would require the FCC to establish a procedure to handle complaints from small businesses. The bill also would require the FCC to perform various studies, prepare reports, and promulgate a variety of regulations.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

The largest budgetary impact of this bill would result from the provisions dealing with universal service. Current standards for universal telecommunications service are implemented through a system of external subsidies (those entailing payments between companies) and internal subsidies (where companies charge low-cost and high-cost customers roughly the same rates). CBO estimates that telecommunications firms would have to pay an additional $7 billion in external subsidies over the next five years in order to implement the universal service provisions of H.R. 1555 and that the amount of internal subsidies would fall by a somewhat greater amount. CBO believes that the external subsidy payments should be included as governmental receipts in the federal budget. The net annual impact of such payments on the federal deficit would be zero because outlays from a universal service fund would be equal to the receipts.

In addition, CBO estimates that enacting H.R. 1555 would increase spending requirements for the FCC by about $15 million over the 1996-1997 period. Because the bill would permit the FCC to increase various fees to offset the costs of implementing its provisions, the increased costs in 1996 and 1997 would be offset by collections of those fees, resulting in no net budgetary impact. CBO also estimates that the FCC would incur additional costs after 1997 for enforcing new regulations issued in 1996 and 1997. CBO estimates that reductions in the FCC's regulatory workload pursuant to the enactment of H.R. 1555 would result in savings sufficiently large to offset those costs. The estimated budgetary impacts are summarized in the following table.

(By fiscal year, in millions of dollars)

	1996	1997	1998	1999	2000
SPENDING SUBJECT TO APPROPRIATIONS ACTION					
Estimated Authorization Level[a]	10	5	0	0	0
Estimated Offsetting Collections	-10	-5	0	0	0
Net Estimated Budget Authority	0	0	0	0	0
Estimated Outlays	0	0	0	0	0
REVENUES					
Existing External Subsidy Collections Under Current Law[b]	4,300	4,300	4,300	4,300	4,400
Proposed Changes in External Subsidy Collections	0	600	1,400	2,200	2,900
Estimated Revenues Under H.R. 1555	4,300	4,900	5,700	6,500	7,300
DIRECT SPENDING					
Existing External Subsidy Payments Under Current Law[b]					

Estimated Obligations					
	4,300	4,300	4,300	4,300	4,400
Estimated Disbursements					
	4,300	4,300	4,300	4,300	4,400
Proposed Changes in External Subsidy Payments[c]					
Estimated Budget Authority					
	0	600	1,400	2,200	2,900
Estimated Outlays					
	0	600	1,400	2,200	2,900
Total External Subsidy Payments Under H.R. 1555 Estimated Budget Authority					
	4,300	4,900	5,700	6,500	7,300
Estimated Outlays					
	4,300	4,900	5,700	6,500	7,300

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a. Appropriations for the FCC are $69 million in fiscal year 1995. No funding has yet been authorized for fiscal year 1996 or subsequent years.

b. These amounts are not currently shown in the federal budget. Estimated collections and disbursements of external subsidies in fiscal year 1995 are $4,200 million.

c. CBO estimates that over the 1996-2000 period, H.R. 1555 would reduce internal subsidy payments by a total of $9 billion to $10 billion.

The costs of this bill fall within budget function 370.

6. BASIS OF ESTIMATE:

This estimate assumes that H.R. 1555 will be enacted by the end of fiscal year 1995, and that the necessary funds will be appropriated each year.

Costs to the FCC

H.R. 1555 would require the FCC to promulgate and enforce numerous regulations and to prepare various studies and reports. Based on information from the FCC, CBO estimates that implementing the provisions of H.R. 1555 would cost the commission $105 million over the 1996-2000 period, but that those increased costs would be offset by a combination of fees and reductions in other FCC regulatory costs. New costs in the first year would be divided between personnel costs associated with rulemakings and studies and overhead costs associated with acquiring necessary space, furnishings, hardware, and software. New costs in later years are primarily for personnel to enforce the new regulations. The FCC would realize savings, however, by transferring personnel and overhead costs from activities that are no longer needed because of the bill to the activities required by the bill. CBO estimates that these savings would total about $90 million over the 1996-2000 period. The bill would permit the FCC to increase various fees to pay for increases in costs resulting from the bill's implementation, so there would be no net increase in discretionary spending resulting from the bill's enactment.

Universal Service

Universal Service Under Current Law. Current FCC regulations establish standards for universal service, which are implemented through various types of subsidies to local

telephone companies from other local telephone and long distance carriers. The external subsidies (those entailing payments between companies) will total approximately $4.3 billion in 1996 and $4.4 billion by 2000. These subsidies aid telephone companies facing higher than average costs, aid low-income customers by providing some services at no cost to those customers, and help pay for special services for the deaf. Telephone companies also internally subsidize their high-cost customers by charging high- and low-cost customers roughly the same rates, and by setting those rates high enough that the excess amount paid by low-cost customers makes up the loss for providing service to high-cost customers. CBO estimates that this rate averaging will total approximately $4.9 billion in 1996 and $5.1 billion by 2000. None of these receipts and payments currently appear in the federal budget.

Universal Service Under H.R. 1555. The primary purpose of H.R. 1555 is to increase competition in telecommunications markets and to provide for an orderly transition from a regulated market to a competitive and deregulated market. The mechanisms currently providing for universal service are uniquely suited for a regulated market where limits on competition guarantee economic returns that are sufficient to attract private investment and to allow firms to subsidize their own high-cost consumers. The market environment that H.R. 1555 would create would make such internal subsidies much less viable because deregulation would remove the near-guaranteed returns allowed in a regulated market, and with them the ability of the regulated firm to subsidize high-cost customers. Thus, CBO expects that over time enactment of H.R. 1555 would lead to the disappearance of internal subsidies (those conveyed within companies, between classes of users). In its place, we would expect a new system of transfers consisting almost entirely of external subsidies that

would appear in the federal budget.

CBO expects that the standard for universal service under H.R. 1555 would be similar to the existing one. Hence, as the current system of internal and external subsidies is replaced by a system consisting primarily of external subsidies, the total amount of subsidies collected from low-cost customers and passed on to high-cost customers would not change significantly. Over time, CBO expects that the operating costs of telephone companies would tend to fall as a result of competitive pressures and that the total amount of subsidies necessary would decline.

Under H.R. 1555, the FCC would establish a definition of universal service, based on the recommendations of a federal-state joint board. The board could revisit that definition from time to time over its five-year life. Under the principles enunciated in H.R. 1555, all telecommunications carriers would participate in the provision and advancement of universal service. In order to implement the goals of universal service in a competitive telecommunications market, the FCC would likely take a variety of actions to ensure the provision of universal telecommunications service, including requiring contributions by companies serving relatively few high-cost customers. Based on information from a variety of industry and regulatory sources, CBO believes that most if not all of the contributions by companies not serving a large number of high-cost customers would be in the form of cash payments, and that these financial payments would be distributed, either by the FCC or by its designee, as a subsidy to those companies serving a large number of high-cost customers.

H.R. 1555 would require that the FCC begin implementing the initial definition of universal service within one year of

enactment. CBO assumes that, for the first five-year period after the bill's enactment, universal service would consist of basic touchtone voice service with long distance access, 911 emergency service, 411 information service, operator assistance services, directory listing, and telecommunications relay services for the deaf. We expect that advanced telecommunications services probably would not be included at this time, but could be included in the future. CBO assumes that the initial implementation of universal service would be phased in over a five-year period.

Budgetary Impact of the New Universal Service Requirement. CBO assumes that the new system of subsidies would begin in 1997, and that the phasing in of the new system and the phasing out of the old system would occur over a five-year period. As a result, CBO estimates that collections to finance subsidy payments between companies would increase by about $600 million in fiscal year 1997 and by a total of $7 billion over the 1997-2000 period. Outlays would grow by the same amounts, resulting in no net change in the federal deficit.

CBO believes that the cash flows from the external subsidies should appear on budget as governmental receipts and direct spending because the payments between companies are made as a result of the exercise of the sovereign power of the federal government, not as a normal business transaction between companies. The payments are a federally-mandated condition for doing business with no relationship between the amounts paid and the level of benefits received. Even if the funds are collected and disbursed by a nonfederal entity, the amounts collected and paid out would be determined by a federal agency under procedures specified in federal law. A nonfederal entity handling these transactions would thus be acting as an agent of the federal government.

The current exclusion of subsidy transfers from the budget may be attributable, at least in part, to the fact that those transfers are the result of judicial and regulatory actions and were not subject to the budgetary scrutiny usually applied to legislation. If H.R. 1555 were enacted, the Administration would determine whether subsidy transfers are included as budget receipts and outlays. CBO's review of the bill, however, leads us to conclude that consistency with current budget concepts requires their inclusion.

Other Budgetary Effects. A number of other provisions would have a minor impact on receipts and direct spending. The FCC would be permitted to levy fines for violations of certain provisions of the bill. CBO estimates that receipts from fines would not be significant.

Finally, the bill would permit the FCC to charge a fee to television broadcasters who choose to use their broadcast spectrum to provide certain additional types of services. CBO does not expect that broadcasters would receive a significant amount of income over the next five years from diverting spectrum from current uses to other commercial services. Therefore, we estimate that any income to the government as a result of imposing a royalty or fee would not be significant.

7. PAY-AS-YOU-GO CONSIDERATIONS:

The Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. The provisions dealing with universal service, royalties charged to television broadcasters, and fines and penalties would affect direct spending and receipts. The following table summarizes the estimated pay-as-you-go impact of H.R.

1555.

(by fiscal year, in millions of dollars)

1995	1996	1997	1998
Change in outlays			
0	0	600	1,400
Change in receipts			
0	0	600	1,400

8. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS:

Implementing the provisions of H.R. 1555 would result in increased costs to most states. The bill would require states to promulgate regulations, direct various audits of Bell companies, and participate in various joint federal-state boards. Based on information from the National Association of Regulatory Utility Commissioners, CBO estimates that states would spend an average of $1.5 million per state over the next two years, and approximately $1 million per state over the period 1998-2000, for a total estimated cost of about $125 million to all states over the five-year period. CBO expects that implementation of H.R. 1555 would result in some costs to local governments to promulgate various regulations and to adapt their laws to the changes made by H.R. 1555. The extent of those costs will depend on the specific details of regulations promulgated by the FCC. As a result, local governments have been unable to provide CBO with any clear indication of the magnitude

of the potential costs, and CBO cannot estimate these amounts.

The bill also would require that state and local governments not discriminate between various telecommunications services when assessing franchise and other fees. If these bodies were to decrease the rates charged for the different services to that of the lowest fee, they could lose substantial amounts of revenues. The bill also would permit state and local governments to charge certain new fees that could offset some or all of any lost revenues. CBO expects that state and local governments would adjust the rates they charge for the various services so that the total amount collected by each state would not diminish significantly, and that state and local governments would further adjust rates to make up at least some of the costs incurred in implementing the requirements of the bill.

H.R. 1555 would prohibit local governments from imposing taxes on direct broadcast satellite services under certain circumstances. CBO does not believe that this provision would have a significant effect on the revenues of state and local governments.

9. ESTIMATE COMPARISON: None.

10. PREVIOUS CBO ESTIMATE:

On May 5, 1995, CBO prepared a cost estimate for S. 652, the Telecommunications Competition and Deregulation Act of 1995, as reported by the Senate Committee on Commerce, Science, and Transportation on March 30, 1995. That estimate stated that implementation of S. 652 would require approximately $62 million in appropriated spending over the 1996-2000 period. We now believe that our estimate of FCC administrative costs resulting from S. 652 was too high, and that costs to the FCC of implementing S. 652 would be similar to those estimated for this bill. The bills differ, however, in that H.R. 1555 would permit the FCC to collect fees to cover those costs.

S. 652 would require that universal service be extended to every household, whereas H.R. 1555 has no such requirements. While subsidy revenues and payments under S. 652 would probably be slightly higher than those estimated for H.R. 1555 over the next five years, the amounts would not differ significantly.

11. ESTIMATE PREPARED BY:

John Webb (226-2860) and Melissa Sampson (226-2720).

12. ESTIMATE APPROVED BY:

Paul N. Van de Water
Assistant Director
for Budget Analysis

Office of the General Counsel

B-278820

February 10, 1998

The Honorable Ted Stevens

United States Senate

Dear Senator Stevens:

This letter is in response to your request dated November 28, 1997, asking us to review the Federal Communications Commission's implementation of section 254(h) of the Communications Act of 1934, as amended. 47 U.S.C. § 254(h). Subsection 254(h) provides the authority for the Commission to authorize universal service support benefits for eligible schools and libraries and rural health care providers.

Your request concerns those provisions of the Commission's orders implementing subsection 254(h) that led to the incorporation in Delaware of two not-for-profit corporations. These corporations were formed to administer certain functions of the universal service programs for schools and libraries and rural health care providers. The Chairman of the Commission selects or approves the board of directors for these entities and the operating expenses of the corporations are recovered from industry fees assessed to support universal service. You asked whether the Commission has the legal authority to establish such corporations. In addition, you asked us to describe the federal laws (for example, the Federal Advisory Committee Act), employment rules, and congressional oversight that govern the operation of the

corporations.

We sought the views of the Commission about these and other questions, and by letter of January 5, 1998, the Commission provided its legal opinion.

Question 1: Was the Commission authorized to establish the Schools and Libraries Corporation and the Rural Health Care Corporation?

Answer: As explained more fully below, the Commission exceeded its authority when it directed the National Exchange Carriers Association, Inc. (NECA) to create the Schools and Libraries Corporation and the Rural Health Care Corporation. The Government Corporation Control Act specifies that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. These entities act as the agents of the Commission and, therefore, could only be created pursuant to specific statutory authority. Because the Commission has not been provided such authority, creation of the two corporations violated the Government Corporation Control Act.

Because the Commission has argued that it did not "establish or acquire" the corporations, we provide some background about the establishment of the corporations. More detail is contained in the attached Appendix.

Establishment of the Corporations

Section 254, as added by the Telecommunications Act of 1996(1), among other things, made the Commission's universal service mandate more explicit and extended the reach of universal service support to schools, libraries and

rural health care providers. The section requires the Commission, acting on the recommendations of a Federal-State Joint Board, to define universal service and develop specific, predictable, and equitable support mechanisms. The provision expands both the base of companies that contribute to the universal service fund and the category of customers who benefit from the universal service support programs.

Section 254 is silent on how the Commission is to administer the universal service programs, including the programs for schools and libraries and rural health care providers. In the Universal Service Order released on May 8, 1997, the Commission, consistent with the Joint Board's recommendation, determined that it would create a Federal Advisory Committee to recommend a neutral, third-party permanent administrator of the universal service programs. In the interim, the Commission appointed the National Exchange Carrier Association, Inc. (NECA) the temporary administrator, subject to changes in NECA's governance.(2) NECA was established in 1983, at the direction of the Commission, as an association of local exchange carriers (LECs) to administer the interstate access tariff and revenue distribution process.(3) Prior to that time, AT&T had acted as a tariff filing agent for the entire industry and had also performed most of the administrative functions in connection with the settlements pooling arrangements.(4) Since NECA's creation, the Commission has assigned it the responsibilities for administering the existing universal service fund and other explicit support mechanisms.

On July 18, 1997, the Commission released NECA's Governance Order and directed NECA to create an independently functioning not-for-profit subsidiary to be designated the Universal Service Administrative Company

(USAC) that would temporarily administer the universal service support program for high-cost areas and low-income consumers, as well as perform billing and collection functions for all of the universal service programs, including the programs for schools and libraries and the rural health care providers.(5)

The Commission also directed NECA to create two unaffiliated, not-for-profit corporations to be designated the Schools and Libraries Corporation and the Rural Health Care Corporation. The Commission concluded that such entities were critical to the successful implementation of the schools and libraries and rural health care programs. Moreover, to ensure continuity in and efficient administration of these programs, the Commission concluded that the corporations should continue to perform their designated functions even after the date on which the permanent administrator is appointed. Thus, the Commission removed these entities from the scope of the functions that will be performed by the temporary and permanent administrator.

NECA was directed to incorporate the corporations under the laws of Delaware and to take such steps as are necessary under Delaware and federal law to make the corporations independent of, and unaffiliated with, NECA and USAC. NECA was further required to submit to the Commission for approval the proposed articles of incorporation, bylaws, and any documents necessary to incorporate the independent corporations in order for the Commission to determine prior to their establishment that the requirements of the Order had been satisfied.

This Order and the subsequent incorporation documents provide that the corporations were organized by the Commission to carry out functions connected with the

provision of universal service support to schools, libraries, and rural health care providers. These functions include the administration of the application process for schools and libraries and rural health care providers and the establishment of a website on which applications will be posted. See 47 C.F.R. §§ 69.618(a), 69.619(a).

The certificate of incorporation of the Rural Health Care Corporation specifies that the purpose of the corporation ". . . is defined in the Federal Communications Commission's . . . rules at 47 C.F.R. § 69.618, as it exists today and as it may be amended." The certificate of incorporation further states that the corporation may engage in other activities "so long as it is consistent with FCC Orders and Rules.(6) In its letter to our Office of January 5, the Commission stated that it did not envision these entities 'operating outside the scope of the activities set forth in the Commission's orders.'" Commission letter at 9.

Under Commission rules the boards of directors of these entities are comprised of members either selected or approved by the Chairman of the Commission. The size and composition of the boards is set by the Commission, as is the term of office. The Commission Chairman must approve the removal of any director as well as a resolution to dissolve the Corporation. The Chief Executive Officer (CEO) of these corporations must be approved by the Chairman of the Commission. Authority to enter into contracts must be in compliance with Commission rules. All of these requirements have been included in the corporations' by-laws.

Authority to Establish the Corporations

It is the Commission's view that it has authority to establish the Schools and Libraries Corporation and the Rural Health

Care Corporation under sections 4(i) and 254 of the Communications Act of 1934, as amended. Section 4(i) of the Act provides that:

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

Although we recognize the breadth of section 4(i),(7) the provision is constrained by the later passage of the Government Corporation Control Act. Under the Control Act:

"[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102.

Section 4(i) does not provide the specific statutory authority needed by the Commission to meet the requirements of the Control Act. Nor do we find that sect on 254 provides this authority.(8) Indeed, the Commission does not suggest chat either of these provisions is broad enough to overcome the requirement of the Control Act. Rather, in a letter to our office dated January 5, 1998, the Commission contends that the Control Act is not unplicated because the Commission did not
"establish or acquire" the Schools and Libraries Corporation or the Rural Health Care Corporation in this case. According to the Commission, NECA established these corporations as a condition of becoming the temporary administrator.

We disagree. The Control Act requirement that a Federal agency possess specific authorization to "establish or acquire" a corporation to act as an agency could not be

avoided by directing another organization to act as the incorporator. In our view, the Control Act prohibits an agency from creating or causing creation of a corporation to carry out government programs without explicit statutory authorization.

Prior to enactment of the Government Corporation Control Act in 1945, there was no requirement for specific authority to create corporations. As the Supreme Court noted in Lebron v. National Railroad Passenger Corporation, "[b]y the end of World War II, Government-created and -controlled corporations had gotten out of hand, in both their number and their lack of accountability." Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 389 (1995).

Partly in response to this proliferation of corporations, a Joint Committee of Congress conducted a 2-year study and issued a "Report on Government Corporations" in 1944.(9) The report concluded that from simple beginnings the government corporation concept had evolved into a rationale for a maze of quasi governmental corporations with little accountability. The inevitable results of this growth, noted the report, was the impairment of control by the Congress. Id. at 2. The report went on to find that the corporations had little congressional or executive branch supervision, few fiscal controls, and in many instances were in competition with the private sector. Specifically, the report stated: "There is no effective over-all control. Alone, or in certain groups, these corporations are autonomous.(10) The Committee called for over-all public control to be established.(11)

Legislative control of government corporations actually occurred in two stages during 1945. In February of that year, legislation required the General Accounting Office (GAO) to audit the financial transactions of all government

corporations.(12) In December, the more comprehensive Government Corporation Control Act superseded these audit requirements.(13)

The Act was intended to make the corporations accountable to the Congress for their operations while allowing them the flexibility and autonomy needed for their commercial activities. Under the Act, the Bureau of the Budget (now Office of Management and Budget) controlled the corporations' budgets, Treasury controlled financial transactions, and GAO performed financial auditing.(14)

The Act also specified that without explicit congressional authorization, no corporation should be acquired or created by "any officer or agency of the Federal Government or by any Government corporation for the purpose of acting as an agency or instrumentality of the United States ...." § 304(a), 59 Stat. 602. In addition, the Act required that all corporations then operating under state charters were to be dissolved and reincorporated under federal law. The House Report accompanying the legislation stated:

"The committee does not consider the practices of chartering wholly owned Government corporations without prior authorization by the Congress or under State charters to be desirable. It believes that all such corporations should be authorized and chartered under Federal statute. The bill provides that in the future all corporations which are to be established for the purpose of acting as agencies or instrumentalities of the United States must be established by act of Congress or pursuant to an act of Congress specifically authorizing such action." H.R. Rep. No. 79-856, at 11 (1945).

The Congress enacted legislation whose applicability was to be encompassing. The requirement for specific legislative

foundation for corporations to act as agents of the United States was not to be thwarted by having another party act as the incorporator. In fact, the identity of the incorporator was not the determinant of the statue's applicability; the act expressly prohibits the "acquisition" of corporations to act as instrumentalities of the United States. As the Supreme Court noted in Lebron, the purpose for providing that government corporations could not be established (or acquired) without specific legislation ". . . was evidently intended to restrict the creation of all Government-controlled policy-implementing corporations, and not just some of them." Id. at 396. Thus, if an entity was to be established for the purpose of carrying out government functions under the control of an agency, legislation would be necessary. In other words, an agency on its own could not create or cause to be created a "captive corporation" to carry out government functions and designate such an entity as "private."

As discussed above and detailed in the attached Appendix, the Schools and Libraries Corporation and the Rural Health Care Corporation were clearly created to carry out governmental functions in connection with the Commission's responsibilities under section 254. We note that even the corporations, themselves, do not deny that they were established by the Commission. For example, the Rural Health Care Corporation, in its Request for Proposals for Program Administration Services defined itself as:

". . . a not-for-profit organization created by the Federal Communications Commission (FCC) to administer funds allocated to rural health care providers to aid in improving the telecommunication infrastructure at rates reasonable and acceptable to urban health care providers."

NECA simply acted as the incorporator for the convenience

of the Commission. There is no nexus between NECA's role as temporary administrator and the creation of these corporations. By the Commission's own rules, these entities were removed from the mandates of both the temporary and permanent administrator. Under the circumstances, we conclude that the Commission violated the Government Corporation Control Act by directing the establishment of the Schools and Libraries Corporation and the Rural Health Care Corporation to act as its agents in carrying out functions assigned by statute to the Commission.

Question 2: What federal laws (for example the Federal Advisory Committee Act), employment rules, and congressional oversight apply to the operation of the corporations?

Answer 2: The Commission's Order required that private corporations be established. As such, they are not subject to statutes that impose obligations on federal entities and federal employees in the areas of employment practices, procurement, lobbying and political activity, ethics, and disclosure of information to the public. On the other hand, each of the corporations is subject to federal statutes applicable to private corporations, unless outside the coverage of the statute. For example, we note that the Federal Advisory Committee Act (FACA) would not apply to these corporations since these entities are primarily operational in nature.(15)

Finally, as established by the Commission, Congress has no direct oversight over the corporations. The corporations do not provide budget information directly to Congress, but rather are accountable to the Commission, which in turn, is accountable to the Congress.(16)

We trust this is responsive to your inquiry.

Sincerely yours,

Robert P. Murphy
General Counsel

(1)Pub. L. 104-104, 110 Stat. 56 (1996).

(2)Federal-State Joint Board on Universal Service, First Report and Order, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1996) (Universal Service Order).

(3)MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, FCC 82-579 (rel. February 28, 1983).

(4)With the imminent breakup of AT&T, the Commission believed that AT&T could no longer perform this function in the post-divestiture environment.

(5)Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, Report and Order and Second Order on Reconsideration, CC Docket No. 97-21 and No. 96-45, FCC 97-253 (rel. July 18, 1997)(NECA Governance Order).

(6)A similar provision is contained in the Schools and Libraries Certificate of Incorporation. See 47 C.F.R. § 69.619(a).

(7)Courts have characterized this section as analogous to Article 1, Section 8, Clause 18 of the Constitution, which

authorizes Congress to make all laws that "shall be necessary and proper" for carrying out its enumerated powers and "all other powers" vested in the federal government. Mobile Communications Corp. of America v. FCC, 77 F.3d 1399, 1404 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 81 (1996); New England Tel. & Tel. v. FCC, 826 F.2d 1101, 1107-08 (D.C. Cir.
1987); North American Telecommunications Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985); see also United States v. Southwestern Cable Co., 392 U.S. 157, 181 (1968).

(8)The Telecommunications Act of 1996 did provide the Commission with specific authority "to create or designate" one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. 47 U.S.C. § 251(e)(1). It also established a body corporate to be known as the Telecommunications Development Fund. This fund provides grants to small businesses to enhance competition in the telecommunications industry, among other things. The provision establishing the fund specifies the composition of the board of directors, as well as its meetings and functions. 47 U.S.C. § 614. However, with respect to the provision of universal service, Congress provided no authority to establish such entities.

(9)U.S. Congress, Joint Committee on Reduction of Nonessential Federal Expenditures, Report on Government Corporations, Senate Doc. 227, 78th Cong., 2d Sess. (Washington: U.S. Govt. Print.Off., 1944).

(10)Id. at p. 27.

(11)For a complete history of the Control Act, see, Managing the Public's Business: Federal Government Corporations

prepared for the Senate Committee on Governmental Affairs by the Congressional Research Service by Ronald C. Moe, S. Prt. 104-18 (April 1995).

(12)Public Law 4, § 5, 59 Stat. 5 (1945).

(13)In 1982, Pub.L. 97-258 codified the 1945 Act's provisions. See 31 U.S.C. §§ 9101-9110.

(14)Primary auditing responsibilities were shifted in 1990 (Pub.L. 101-576) from GAO to the individual corporate Inspectors General appointed under the Inspector General Act of 1978.

(15)The Federal Advisory Committee Act (FACA) was enacted to control the establishment of advisory committees to the federal government and to allow the public to monitor their existence, activities and costs. FACA's legislative history, relevant court cases, and General Services Administration regulations suggest that coverage is limited to those committees that provide advice and are not operational in nature. See, H.R. Rep. No. 92-1017, at 4 (1972); S. Rep. No. 92-1098, at 8 (1972); Judicial Watch, Inc. v. Clinton, 76 F.3d 1232 (D.C. Cir. 1996); and 41 C.F.R. § 101-6.10004(g).

(16)A Memorandum of Understanding between the Department of Treasury, the Commission, and NECA, dated April 1997, provides the concepts and guidelines for reporting cash transactions and accrual-based balances of the Universal Service Fund to meet the fiscal needs of the U.S. Treasury. The Congressional Budget Office and the Office of Management and Budget have interpreted the language of the Telecommunications Act of 1996 to mean that payments into the Universal Service Fund should be counted as federal

revenues and payments from the fund as federal outlays. This is because the transfers of income between various classes of telephone users would not occur but for the exercise of the sovereign power of the federal government. Furthermore, portions of the Universal Service Fund, most notably its Lifeline and Linkup Programs, have already been included in the federal budget. "Federal Subsidies of Advanced Telecommunications for Schools, Libraries, and Health Care Providers" prepared by the Congressional Budget Office (January 1998).